TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 184

HENRY A. KIESELBACH AND OLGA M. KIESELBACH, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 27, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

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COMMISSIONER OF INTERNAL REVENUE

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APPENDIX B TO BRIEF FOR PETITIONER

APPENDIX B

DOCKET NO. 98897

HENRY A. KIESELBACH AND MRS. OLGA M. KIESELBACH, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES:

For Taxpayer: Harry Friedman, Esq., Julien W. Newman, Esq.

For Comm'r: Arthur W. Carnduff, Esq., E. M. Woolf, Esq.

DOCKET ENTRIES

1939

June 1—Petition received and filed. Taxpayer notified. (Fee paid).

June 1—Copy of petition served on General Counsel.

June 9—Notice of appearance of Julien W. Newman as counsel filed.

July 1—Answer filed by General Counsel.

July 1—Request for circuit hearing in Newark, New Jersey, filed by General Counsel.

July 8—Notice issued placing proceeding on Newark, N. J., Calendar. Answer and request served.

1940

May 17—Motion for leave to file amended answer; amended answer lodged, filed by General Counsel. 5/21/40 granted.

June 20—Reply to amended answer filed by taxpayer. 6/20/40 copy served on General Counsel.

July 6—Hearing set September 23, 1940, New York City.

442916—42——3

Sept. 23—Hearing had before Mr. Murdock on merits. Petitioner's motion to amend petition. Petitioner ordered to file amended petition. Photostat of 1937 return filed. Stipulation of facts and supplemental stipulation of facts filed. Briefs due 1/2/41; reply briefs 15 days thereafter.

Sept. 24—Transcript of hearing of Sept. 23, 1940 filed.

Oct. 9—Amended petition filed by taxpayer. 10/10/40 copy served on General Counsel.

Nov. 26—Answer to amended petition filed by General Counsel. 11/27/40 copy served.

Dec. 17—Brief filed by taxpayer.

Dec. 28—Motion for extension of 30 days to file brief filed by General Counsel. 1/3/41 granted as to both parties.

1941

Feb. 1—Brief filed by General Counsel.

Feb. 3—Copy of brief served on General Counsel.

Apr. 24—Opinion rendered, Murdock, Div. 3. Decision will be entered under Rule 50. 4/26/41 copy served.

May 17—Motion for reconsideration and modification of the opinion by the division of the Board and if such modification is refused, motion for review by the Full Board and modification of the opinion of the division, filed by General Counsel.

May 20—Hearing set May 28, 1941 on motion.

May 28—Hearing had before Mr. Murdock on motion of respondent for reconsideration and modification of the opinion of the Division of the Board, C. A. V.

May 29—Order that report of Div. 3, promulgated April 24, 1941, be reviewed by the Board, entered.

June 6—Order that report and determination be affirmed, entered, Arundell, Div. 7.

June 10—Transcript of hearing 5/28/41 filed.

July 9—Computation of deficiency filed by General Counsel.

July 11—Hearing set July 30, 1941 on settlement.

July 17—Consent to settlement filed by taxpayer.

Aug. 5—Decision entered, Murdock, Div. 3.

Aug. 28—Order amending decision of Aug. 5, 1941, entered. Murdock, Div. 3.

Oct. 27—Petition for review by United States Circuit Court of Appeals, Third Circuit, filed by General Counsel.

Oct. 29—Proof of service filed.
Nov. 3—Proof of service of petition for review filed by General Counsel.
Nov. 22—Motion for extension of time to Jan. 25, 1942 to prepare and transmit the record filed by General Counsel.
Nov. 22—Order enlarging time to Jan. 24, 1942, to prepare and transmit the record, entered.
Dec. 24—Statement of points filed by General Counsel—with proof of service thereon.
Dec. 24—Agreed designation of portions of record; proceedings and evidence to be contained in record filed—with proof of service thereon.

In the United States Board of Tax Appeals

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols JP–90D) dated May 5, 1939, and as a basis of this proceeding allege as follows:

(1) The petitioners are individuals residing at 45 Myrtle Avenue, Montclair, New Jersey. The return for the period here involved was filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, New Jersey.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on May 5, 1939.

(3) The taxes in controversy are income taxes for the calendar years 1936 and 1937, and in the respective amounts of $17.08 and $2,809.82, a total of $2,826.90, all of which is in dispute.

(4) The determination of tax, set forth in said notice of deficiency is based upon the following errors:

1. The respondent in computing the deficiency for

the year 1936 erred in failing to deduct from the total tax liability the sum of $17.08 paid by the petitioners to the Collector of Internal Revenue at Newark, New Jersey on October 4, 1938.

2. The respondent in computing the deficiency for the year 1937 erred in taxing as ordinary income, the sum of $15,245.57, part of an award received by the petitioner on the condemnation of property, the profit on which is taxable as capital gain.

3. The respondent in computing the deficiency for 1937 erred in including in income 40%, instead of 30%, of the capital gain realized by petitioners on the sale of property.

(5) The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(1A) The petitioners filed their tax return for the year 1936 with the Collector of Internal Revenue at Newark, New Jersey. There was assessed and paid on said return a tax of $665.95.

(1B) On September 24, 1938, petitioners were notified by the respondent of a proposed deficiency of $17.08 for the year 1936, and on October 4, 1938 paid said sum, together with interest thereon in the amount of $1.58, a total of $18.66, to the Collector of Internal Revenue at Newark, New Jersey.

(1C) The respondent, in computing the deficiency for the year 1936, as shown in his letter dated May 5, 1939, did not deduct from the total tax liability the payment made by the petitioners, as set out in the preceding paragraph.

(2A) The petitioners, on April 2, 1927, acquired property consisting of improved real estate located at 293 Atlantic Avenue, Brooklyn, New York. This property, with the exception of 400 square feet, was

condemned by the City of New York on January 3, 1933, and title to the portion of the property condemned passed to the City on said date.

(2B) On May 20, 1935, an award to the petitioners in the amount of $58,000.00 was published. The New York law provided that upon the condemnation of property, the title passed to the City of New York and interest at the legal rate should be allowed "as part of the compensation to which the owners are entitled" from the date of the taking to the date of payment.

(2C) Pursuant to the award, there was paid to the petitioners on May 12, 1937, the sum of $73,246.57. The petitioners reported the gain on the sale of the property as capital gain and included 30% thereof in income on the tax return for the year 1937. The respondent, in the deficiency letter, segregated $15,246.57 of the award as representing interest from January 3, 1933 to the date of payment of the award, including said sum of $15,246.57 in ordinary income.

(3A) The petitioners filed the return for 1937 on the cash receipts and disbursements basis.

(3B) The sale of the property to the City of New York was not a completed transaction for tax purposes until May 12, 1937. Therefore, the petitioners held said property from April 2, 1927 to May 12, 1937, a period of more than 10 years.

WHEREFORE, the petitioners pray that the Board may hear the proceeding and

1. Disallow the deficiencies proposed.

2. Allow the petitioners credit for the payment of the taxes in the amount of $17.08 for the year 1936.

3. Decide that the interest on the award was part of the award and should be included in income as capital gain, rather than ordinary income.

4. Decide that the petitioners held the property for more than 10 years, and that only 30% of the gain thereon should be included in taxable income.

/s/ HARRY FRIEDMAN
Harry Friedman,
538 Munsey Building, Washington, D. C.

/s/ JULIEN W. NEWMAN
Julien W. Newman,
39 Broadway, New York, New York,
Counsel for Petitioners.

STATE OF NEW YORK }
County of New York } *ss:*

Henry A. Kieselbach and Olga M. Kieselbach being duly sworn, say that they are the petitioners above named; that they have read the foregoing petition, and are familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that these they believe to be true.

/s/ HENRY A. KIESELBACH
Henry A. Kieselbach
/s/ OLGA M. KIESELBACH
Olga M. Kieselbach

Subscribed and sworn to before me this 31st day of May, 1939.

/s/ PAULITA ANDREWS
Notary Public New York County Clerk's No. 105
New York County Register's No. 1A186
Commission expires March 30, 1941.

EXHIBIT "A"

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Office of
Internal Revenue Agent in Charge
Newark, N. J. Division

MAY 5, 1939.

Mr. HENRY A. KIESELBACH and
Mrs. OLGA M. KIESELBACH, Husband and Wife,
43 Myrtle Avenue, Montclair, New Jersey.

SIR AND MADAM: You are advised that the determination of your income tax liability for the taxable years ended December 31, 1936 and 1937 discloses a deficiency of $2,826.90, as shown in the Statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Newark, New Jersey, for the attention of JP–90D. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after

filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING, *Commissioner,*

By ——— ———.

Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.
JP/hgb

STATEMENT

JP-90D.

Mr. Henry A. Kieselbach and Mrs. Olga M. Kieselbach, Husband and Wife, 43 Myrtle Avenue, Montclair, New Jersey.

Tax Liability for the Taxable Years Ended December 31, 1936 and 1937.

Year	Liability	Assessed	Deficiency
1936	$683.03	$665.95	$17.08
1937	4,681.74	1,871.92	2,809.82
Total	5,364.77	2,537.87	2,826.90

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated July 25, 1938; to your protest dated October 18, 1938; and to the statements made at the conference held on February 28, 1939.

A copy of this letter and statement has been mailed to your representative, Mr. Harry Friedman, 538 Munsey Building, Washington, D. C., in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

TAXABLE YEAR ENDED DECEMBER 31, 1936

Adjustments to Net Income

Net income as disclosed by return	$13,411.47
Unallowable deductions and additional income:	
(a) Additional taxable gain from the retirement of 7% cumulative preferred stock of the Orange and Rockland Electric Company	161.20
Net income adjusted	$13,572.67

EXPLANATION OF ADJUSTMENTS

(a) In accordance with the provisions of Section 115 (c) of the Revenue Act of 1936 and Article 115–5 of Regulations 94, the gain of $403.00 realized by you from the retirement of 7% cumulative preferred stock of the Orange and Rockland Electric Company is taxable in its entirety. Inasmuch as on your return only 60%, or $241.80, of the gain realized from this retirement was reported as taxable income, an adjustment of $161.20 is necessary in order to reflect your correct taxable net income.

Computation of Tax

Net income adjusted		$13,572.67
Less:		
Personal exemption	$2,500.00	
Credit for dependents	733.33	
		3,233.33
Balance (surtax net income)		10,339.34
Less:		
Earned income credits (10% of $13,572.67)		1,357.27
Net income subject to normal tax		8,992.07
Normal tax at 4% on $8,992.07		359.68
Surtax on $6,339.34 (amount in excess of $4,000.00)		323.75
Total tax		683.03
Correct income tax liability		683.03
Income tax assessed:		
Original, account No. 201115		665.95
Deficiency of income tax		17.08

TAXABLE YEAR ENDED DECEMBER 31, 1937

Adjustments to Net Income

Net income as disclosed by return	$22,123.10
Unallowable deduction and additional income:	
(a) Interest	15,246.57
Total	37,369.67
Nontaxable income and additional deductions:	
(b) Adjustment of capital net gain	2,158.71
Net income adjusted	35,210.96

EXPLANATION OF ADJUSTMENTS

(a) The examination disclosed that on May 12, 1937 you received from the City of New York the amount of $73,246.57, representing an award of $58,000.00 made to you for property condemned for public purposes and interest thereon in the amount of $15,246.57 for the period dating from January 3, 1933 (the date the City of New York took title to the property giving rise to the award) to May 12, 1937 (the date of payment of the award).

It is your contention that this interest of $15,246.57 is part of the award itself, being, in fact, compensation for the taking of property, and that it should be taxed, not as ordinary income, but as the award itself, that is, as capital gain. On your return this item of interest has been treated as part of the award itself, subject to tax as capital gain.

The Bureau holds that the aforesaid interest is compensation, not for the property itself, but for the use of money due, and that it is subject to tax as ordinary income.

In support of its position, your attention is directed to the case of *Jamieson Associates, Inc. et al.* v. *Commissioner of Internal Revenue*, 37 B. T. A. 92, in which the identical issue is involved. In that case it was

held that the interest was compensation, not for the property taken, but for the use of money due. In its opinion, the Board quotes as follows from the decision rendered in the case of *Woodward Brown Realty Co.*, v. *City of New York*, 193 N. Y. S. 162 (203 App. Div. 625):

> The theory of the law is that where land is taken from a private owner by the right of eminent domain for a public use, payment of the value thereof should be coincident with the taking, and if for any reason payment is postponed the right to interest, from the date of the taking of the property until the date of payment, follows as a matter of constitutional right. People ex rel. Central Trust Co. * * *"

The Board held:

> "* * * Section 976 of the Greater New York City charter provides that, where property is condemned by the city 'Interest at the legal rate upon the sum or sums to which the owners are justly entitled * * * shall be awarded * * * as part of the compensation to which the owners are entitled'. This interest is compensation, but not compensation for the property itself, not for the capital. It is interest upon and compensation for use of money due. If petitioners had, on July 15, 1925, when their properties were taken by the city, been actually paid the then value, there would have been no interest paid them, but they were not paid anything until 1931. The judgment of June 9, 1931, does not mention interest, but merely itemized the amounts awarded. The 'final decree' prepared in accordance with the judgment adds interest to the awards already computed. We hold that such interest was taxable income to the petitioners in 1931 at ordinary rates, and that the respondent did not err in so determining. * * *"

In view of the above, your contention has been denied, and the item of interest of $15,246.57 has been treated as ordinary income subject to income tax at ordinary rates.

(b) The examination disclosed that the taxable portion of the capital net gain realized by you in the condemnation proceedings referred to under item (a) of this schedule was overstated on your return in the amount of $2,158.71.

The records disclose that the property taken in these proceedings was acquired by you through inheritance on April 2, 1927; that the City of New York took title to the property on January 3, 1933; that the award was published on May 20, 1935; and that you received the award and interest thereon on May 12, 1937.

It is your contention that, inasmuch as the transaction was, for income tax purposes, not finally consummated until May 12, 1937, the period during which the property was held by you extends from April 2, 1927 to May 12, 1937, (a period in excess of 10 years) and that, in accordance with the provisions of Section 117 (a) of the Revenue Act of 1936, the net gain derived from the award should be taxed at the rate of 30% thereof. You contend further that a contrary ruling must eliminate the entire gain from the year 1937.

The Bureau's files disclose that your returns for the years 1933 to 1937, inclusive, were prepared and filed upon the basis of cash receipts and disbursements. The fact that, upon this basis of reporting, the net gain derived from the award did not become subject to the imposition of income tax until actually realized has, obviously, no bearing upon the facts relating to the period during which the property giving rise to

the award was held by you. The Bureau holds that the property was held by you from April 2, 1927, the date of its acquisition, to January 3, 1933, the date on which the City of New York took title to the premises. This period being more than five years but not more than ten years, the gain derived from the award is taxable to the extent of 40% thereof.

In view of the above, your contention has been denied.

The computation of the overstatement of taxable net gain on your return follows:

Amount of award			$58,000.00
Less:			
Attorney fees and disbursements		$2,479.39	
Assessment for Jay Street opening		824.92	
			3,304.31
Balance			$54,695.69
Basis of cost of property condemned:			
Building	$15,000.00		
Less:			
Depreciation allowed or allowable for the period April 2, 1927 to January 3, 1933, inclusive, (5 years and 9 months at 2½% per annum)	2,156.25		
Unrecovered cost of building		$12,843.75	
Land, total plot of 2,000 square feet	$35,000.00		
Less:			
Cost of 400 square feet not taken in the proceedings	5,040.00		
Cost of land		29,960.00	
Total cost of building and land			42,803.75
Net gain			$11,891.94
Percentage of net gain to be taken into account under the provisions of Section 117 (a) of the Revenue Act of 1936			×40%
Taxable net gain 40% of $11,891.94 or			$4,756.78
Taxable net gain reported on the return			6,915.49
Overstatement of taxable net gain on the return			2,158.71

Computation of Tax

Net income adjusted		$35,210.96
Less:		
Personal exemption	$2,500.00	
Credit for dependents	400.00	
		2,900.00
Balance (surtax net income)		$32,310.96
Less:		
Earned income credit (10% of $14,000.00)		1,400.00
Net income subject to normal tax		$30,910.96
Normal tax at 4% on $30,910.96		$1,236.44
Surtax on $28,310.96 (amount in excess of $4,000.00)		3,445.30
Total tax		$4,681.74
Correct income tax liability		$4,681.74
Income tax assessed:		
Original, account No. 202000		1,871.92
Deficiency of income tax		$2,809.82

UNITED STATES BOARD OF TAX APPEALS

ANSWER

Comes now the Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein admits, denies and avers as follows:

(1). and (2) Admits the allegations set forth in paragraphs (1) and (2) of the petition.

(3) Admits that the taxes in controversy are income taxes for the year 1937, and denies that they are in controversy for the year 1936 as alleged in paragraph (3) of the petition, but neither admits nor denies the remaining allegations of said paragraph and demands strict proof thereof.

(4) 1., 2. and 3. Denies that the respondent erred as alleged severally in subparagraphs 1., 2. and 3. of paragraph (4) of the petition.

(5) (1A) and (1B) Admits the allegations set forth in subparagraphs (1A) and (1B) of paragraph (5) of the petition.

(1C) Neither admits nor denies the allegations set forth in subparagraph (1C) of paragraph (5) of the petition.

(2A) Admits that petitioners acquired said property on April 2, 1927, and that a portion thereof was condemned by the City of New York on January 3, 1933 as alleged in subparagraph (2A) of paragraph (5) of the petition, but neither admits nor denies the remaining allegations of said subparagraph, and demands strict proof thereof.

(2B) Admits that an award was made to petitioners as alleged in subparagraph (2B) of paragraph (5) of the petition, on May 20, 1935, in the principal sum of $58,000.00, but neither admits nor denies the remaining allegations of said subparagraph, and demands strict proof thereof.

(2C) Admits the allegations set forth in subparagraph (2C) of paragraph (5) of the petition.

(3A) Admits the allegations set forth in subparagraph (3A of paragraph (5) of the petition.

(3B) Denies the allegations set forth in subparagraph (3B) of paragraph (5) of the petition.

(6) Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL,
H. C. C.

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

OF COUNSEL:
HARTFORD ALLEN,
Division Counsel,
HENRY C. CLARK,
Special Attorney,
Bureau of Internal Revenue.

HCC/dms

AMENDED ANSWER

UNITED STATES BOARD OF TAX APPEALS

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed herein, admits, denies and alleges as follows:

(1). Admits the allegations of paragraph (1) of the petition.

(2). Admits the allegations of paragraph (2) of the petition.

(3). Admits that the taxes in controversy are income taxes for the calendar years 1936 and 1937, but denies the remaining allegations of paragraph 3 of the petition.

Alleges that the correctness of the Commissioner's determination that there is a deficiency in income tax for the year 1936 in the amount of $17.08 is not disputed in the petition.

Alleges that the correct deficiency in income tax for the year 1937 is $4,899.49 as shown in the statement attached hereto as Schedule 1 and made a part hereof, and as alleged in said Schedule 1.

Alleges that the deficiency of $2,809.82 for the year 1937 as proposed in the notice of deficiency attached to the petition should be increased in the amount of $2,089.67.

Alleges that the gain derived by these petitioners because of the condemnation of their property and the award granted and paid to them pursuant thereto (as alleged in the petition and admitted by this Amended Answer) was ordinary gain, taxable in the full amount of the said gain as ordinary income and not as capital gain.

Alleges that the interest upon said award was taxable as ordinary income and not as capital gain.

Alleges that the depreciation upon the building on the property described in the petition was sustained by these petitioners for 8 years and 3 months and not for 5 years and 9 months as stated in the notice of deficiency, and that the correct amount of depreciation sustained by those petitioners upon said building was $3,093.75 and not $2,156.25 as stated in the notice of deficiency.

Alleges that the increased deficiency for the year 1937, for which claim is hereby made, results from the determination that the gain resulting from the condemnation of property and the payment of an award pursuant thereto, with interest, to the petitioners is ordinary gain, taxable as ordinary income and not as capital gain, and that the interest paid upon said award is ordinary gain, taxable as ordinary income and not as capital gain and that in computing said gain, depreciation upon the building described in the petition was sustained by the petitioners for 8 years and 3 months and not for 5 years and 9 months, and that the correct depreciation to be taken into account in computing said gain is $3,093.75 and not $2,156.25.

Alleges that the correct taxable net income of the petitioners for the taxable year ended December 31, 1937 is $43,283.62 and not $35,210.96 as stated in the notice of deficiency attached to the petition, and that the items and details of the said increase of $8,072.66 in taxable net income over the taxable net income stated in the notice of deficiency are shown in Schedule 1 attached hereto and made a part hereof.

(4), 1, 2 and 3. Denies that the respondent erred as alleged in paragraph (4) of the petition and all subparagraphs thereof.

(5), (1A). Admits the allegations of subparagraph (1A) of paragraph (5) of the petition.

(1B). Admits the allegations of subparagraph (1B) of paragraph (5) of the petition except that it is denied that said sum of $17.08 and $1.58 interest thereon was paid on October 4, 1938. Alleges that the petitioners paid to the Collector of Internal Revenue at Newark, New Jersey, on October 8, 1938 the sum of $17.08 and $1.58. Alleges that the deficiency of $17.08 for the calendar year 1936 as stated in the notice of deficiency attached to the petition has not been assessed. Alleges that the petitioners have not contested the correctness of the Commissioner's determination of the petitioner's income tax liability for the calendar year 1936 and have not alleged that the Comissioner erred in determining a deficiency in income taxes due from the petitioners for the calendar year 1936 in the amount of $17.08 as stated in the notice of deficiency attached to the petition. Alleges that the petitioners have not stated any facts sustaining any allegation of error in respect of the determination of their income tax liability for the year 1936 and have not alleged any error or stated any facts contesting the Commissioner's determination of their income tax liability for the year 1936 as shown in the notice of deficiency attached to the petition.

(1C). Admits the allegations of subparagraph (1C) of paragraph (5) of the petition.

(2A). Admits the allegations of subparagraph (2A) of paragraph (5) of the petition except that it is denied that the title to the portion of the property condemned passed to the City of New York on January 3, 1933.

(2B). Admits that on May 20, 1935 an award to the petitioners in the amount of $58,000 and interest was published, but denies the remaining allegations

of subparagraph (2B) of paragraph (5) of the petition.

(2C). Admits the allegations of subparagraph (2C) of paragraph (5) of the petition, except that it is denied that the gain as reported by the petitioners was the correct amount of gain derived from said condemnation and award. Admits that pursuant to said award the petitioners received on May 12, 1937 the sum of $58,000 plus interest of $15,246.57, or a total of $73,246.57, because of said award, and that the cost basis as of April 2, 1927 of $35,000 for all of the land (including the 400 feet not taken by the condemnation proceedings), and of $15,000 for the building as reported in the return of the petitioners was correct.

(3A). Admits the allegations of subparagraph (3A) of paragraph (5) of the petition.

(3B). Denies the allegations of subparagraph (3B) of paragraph (5) of the petition.

6. Denies generally and specifically each and every allegation of the petition not herein specifically admitted or denied.

Further answering the petition, respondent alleges:

7. The petitioners acquired the property at 293 Atlantic Avenue, Brooklyn, New York, described in subparagraph (2A) of paragraph (5) of the petition, on April 2, 1927 at a cost basis of $35,000 for the land and $15,000 for the building, and said property was condemned by the City of New York on January 3, 1933 (except 400 square feet of land thereof), and on May 20, 1935 an award of $58,000 was published pursuant to said condemnation, and on May 12, 1937 said award of $58,000 plus $15,246.57 interest thereon, or a total of $73,246.57, was paid to the petitioners. The petitioners occupied the said property and had possession thereof and collected rent therefrom and enjoyed the use and benefit of said property until June 30, 1935,

which said date was 8 years and 3 months after petitioners had acquired the said property. The said building was subject to depreciation for said period. The net gain to petitioners as a result of the taking of the said property and the payment therefor was $28,076.01 as is shown by Schedule 1 attached hereto and made a part hereof.

The said net gain was ordinary gain and not capital gain.

The correct net taxable income of the petitioners for the taxable year ended December 31, 1937 is $43,283.62 and the total tax liability of the petitioners for said year is $6,771.41 and there is a deficiency in income taxes due from the petitioners for said year in the amount of $4,899.49 as is set forth in Schedule 1 attached hereto and made a part hereof.

WHEREFORE, it is prayed:

1. That the Board find that there is a deficiency in income tax due from these petitioners for the calendar year 1936 in the amount of $17.08.

2. That the appeal be denied with respect to the errors alleged in the petitior

3. That the Board hear this appeal and redetermine the tax liability of these petitioners for the year 1937 on the basis of the affirmative relief herein requested and that the Board redetermine the income tax liability of these petitioners for the year 1937 in accordance with the computation attached hereto as Schedule 1.

4. That the Board allow the increased deficiency as herein alleged and find that there is a deficiency in income taxes for the calendar year 1937 due from these petitioners in the amount of $4,899.49 for which increased deficiency claim is hereby made.

5. That the Board grant the affirmative relief herein prayed for and find that the deficiency in income tax of $2,809.82 for the calendar year 1937 as stated in the

notice of deficiency should be increased in the amount of $2,089.67 and that the correct deficiency for said year is $4,899.49.

(Signed) J. P. WENCHEL,
A. W. C.
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

OF COUNSEL:
HARTFORD ALLEN,
Division Counsel,
ARTHUR W. GARNDUFF,
Special Attorney,
Bureau of Internal Revenue.

AWC/mrc

SCHEDULE 1

STATEMENT OF INCOME TAX LIABILITY OF HENRY A. KISSELBACH AND MRS. OLGA M. KISSELBACH (HUSBAND AND WIFE) FOR THE TAXABLE YEAR ENDED DECEMBER 31, 1937.

Net Income

Net income as shown in the deficiency notice dated May 5, 1939, a copy of which is attached to the petition	$35,210.96
As adjusted	43,283.62
Difference (net addition)	$8,072.66

The net addition to taxable income of $8,072.66 results from the determination:

First,—No part of the gain realized by the taxpayers on disposition of their property under condemnation proceedings brought by the City of New York, is subject to the limitation provided by Section 117 (a) of the Revenue Act of 1936 and, therefore, the entire net gain of $28,076.01 is subject to income tax in lieu of the amount of $20,003.35 ($15,246.57 plus $4,756.78) which is reflected in the statutory deficiency notice, or a

net increase of $8,072 66 in the net gain previously determined.

Second.—In arriving at the corrected net gain of $28,076.01, the allowance for depreciation sustained on the building is computed as $3,093.75 at 2½% per annum, on the cost of $15,000.00, for 8 years, 3 months, from April 2, 1927 to June 30, 1935, instead of $2,156.25, representing depreciation for 5 years, 9 months from April 2, 1927 to January 3, 1933, as shown in the deficiency notice.

Explanation of Adjustment (Addition)

The net income of $35,210.96 as shown in the deficiency notice, dated May 5, 1939, referred to above, is increased by $8,072.66, representing additional gains realized as the result of condemnation proceedings brought by the City of New York. The computation of the additional gain is as follows:

Amount received as award			$73,246.57
Less:			
Attorneys' fees and disbursements		$2,479.39	
Assessment for Jay Street opening		824.92	
			3,304.31
Balance			$69,942.26
Deduct: Basis of property condemned:			
Cost of building	$15,000.00		
Less: Depreciation sustained at the rate of 2½% per annum for 8 years, 3 months	3,093.75		
		$11,906.25	
Cost of land, total plot of 2,000 square feet	$35,000.00		
Less: Cost of 400 square feet not involved in proceedings	5,040.00		
		29,960.00	
Total cost of building and land			41,866.25
Net gain			$28,076.01

Less: Amounts reflected as taxable income in the deficiency notice dated May 5, 1939, as follows:		
Amount treated as interest received in adjustment (a) of the deficiency notice	$15,246.57	
Amount treated as capital net gain, under adjustment (b) of the deficiency notice, (40% of $11,891.94)	4,756.78	
		20,003.35
Net addition (increase in net income)		$8,07[illegible].66

Computation of Tax

Net income as adjusted as above		$43,283.62
Less:		
Personal exemption	$2,500.00	
Credit for dependent	400.00	
		2,900.00
Balance (Surtax net income)		$40,383.62
Less: Earned income credit (10% of $14,000.00)		1,400.00
Net income subject to normal tax		$38,983.62
Normal tax at 4% on $38,983.62		$1,559.34
Surtax on $40,383.62		5,212.07
Total tax liability		$6,771.41
Tax previously assessed: Original, account #202000		1,871.92
Deficiency in assessment		$4,899.49

AMENDED PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols JP–90D) dated May 5, 1939, and as a basis of this proceeding allege as follows:

(1) The petitioners are individuals residing at 43 Myrtle Avenue, Montcl[illegible]r, New Jersey. The return for the period here involved was filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, New Jersey.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on May 5, 1939.

(3) The taxes in controversy are income taxes for the calendar years 1936 and 1937, and in the respective amounts of $17.08 and $2.809.82, a total of $2,826.90, all of which is in dispute.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

1. The respondent in computing the deficiency for the year 1936 erred in failing to deduct from the total tax liability the sum of $17.08 paid by the petitioners to the Collector of Internal Revenue at Newark, New Jersey, on October 4, 1938.

2. The respondent in computing the deficiency for the year 1937 erred in taxing as ordinary income the sum of $15,246.57, part of an award received by the petitioner on the condemnation of property, the profit on which is taxable as capital gain.

3. The respondent in computing the deficiency for 1937 erred in including in income 40%, instead of 30%, of the capital gain realized by petitioners on the sale of property.

(5) The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(1A) The petitioners filed their tax return for the year 1936 with the Collector of Internal Revenue at Newark, New Jersey. There was assessed and paid on said return a tax of $665.95.

(1B) On September 24, 1938, petitioners were notified by the respondent of a proposed deficiency of $17.08 for the year 1936, and on October 4, 1938 paid said sum, together with interest thereon in the amount of $1.58, a total of $18.66, to the Collector of Internal Revenue at Newark, New Jersey.

(1C) The respondent, in computing the deficiency for the year 1936, has shown in his letter dated May 5, 1939, did not deduct from the total tax liability the

payment made by the petitioners, as set out in the preceeding paragraph.

(2A) The petitioners on April 2, 1927, acquired property consisting of improved real estate located at 293 Atlantic Avenue, Brooklyn, New York. This property, with the exception of 400 feet, was condemned by the City of New York, pursuant to Section 976 of the Greater New York Charter, in a proceeding filed on December 30, 1930, in the Supreme Court of the State of New York in and for the Second Judicial District. The final decree in that proceeding was entered on March 31, 1937. The petitioner and the City of New York had a right of appeal from this final decree, the time for which expired on April 30, 1937.

(2B) The just compensation awarded to the petitioners in the said proceeding was $73,246.57.

(2C) Pursuant to the award, there was paid to the petitioners on May 12, 1937, the sum of $73,246.57. The petitioners reported the gain on the sale of the property as capital gain and included 30% thereof in income on the tax return for the year 1937. The respondent, in the deficiency letter, segregated $15,246.57 of the award as representing interest from January 3, 1933 to the date of payment of the award, including said sum of $15,246.57 in ordinary income.

(3A) The petitioners filed the return for 1937 on the cash receipts and disbursements basis.

(3B) The sale of the property to the City of New York was not a completed transaction for tax purposes until May 12, 1937. Therefore, the petitioners held said property from April 2, 1927 to May 12, 1937, a period of more than 10 years.

WHEREFORE, the petitioners pray that the Board may hear the proceeding and

1. Disallow the deficiencies proposed.

2. Allow the petitioners credit for the payment of the taxes in the amount of $17.08 for the year 1936.

3. Decide that the "interest" on the award was part of the award and should be included in income as capital gain, rather than ordinary income.

4. Decide that the petitioners held the property for more than 10 years, and that only 30% of the gain thereon should be included in taxable income.

(Signed) HARRY FRIEDMAN
Harry Friedman,
538 Munsey Building, Washington, D. C.
(Signed) JULIEN W. NEWMAN
Julien W. Newman,
39 Broadway, New York, New York.
Counsel for Petitioners.

STATE OF NEW YORK }
County of New York } *ss:*

Henry A. Kieselbach and Olga M. Kieselbach being duly sworn, say that they are the petitioners above named; that they have read the foregoing petition, and are familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those they believe to be true.

(Signed) HENRY A. KIESELBACH
Henry A. Kieselbach
(Signed) OLGA M. KIESELBACH
Olga M. Kieselbach

Subscribed and sworn to before me this 7th day of October, 1940.

(Signed) PAULITA ANDREWS
Notary Public New York County Clerk's No.
105 New York County Register's No. 1186
Commission expires March 30, 1941

UNITED STATES BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION

Now comes the respondent, the Comissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein, admits and denies as follows:

1 and 2. Admits the averments contained in paragraphs (1) and (2) of the amended petition.

3. Denies the averments contained in paragraph (3) of the amended petition.

4. Denies the allegations of error contained in paragraph (4) of the amended petition and all subparagraphs thereof.

5. Denies the averments contained in paragraph (5) of the amended petition and all subparagraphs thereof.

6. Denies generally and specifically all allegations in the amended petition not herein admitted or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL,
W. R. L.
J. P. Wenchel
Chief Counsel, Bureau of Internal Revenue.

OF COUNSEL:
HARTFORD ALLEN,
Division Counsel,
WILLIS R. LANSFORD,
Special Attorney,
Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

STIPULATION OF FACTS

It is hereby stipuated by and between the parties hereto, by their respective attorneys, that the following

facts shall be taken as true upon the trial of the foregoing case, subject to the right of either party to object to the relevancy or materiality of any of the facts herein stated, and subject further to the right of either party to introduce other and further evidence not inconsistent with any of the facts herein stated:

1. The petitioners, Henry A. Kieselbach and Olga M. Kieselbach, are husband and wife and reside at 43 Myrtle Avenue, Montclair, New Jersey. They filed joint returns for the years 1936 and 1937 with the Collector of Internal Revenue for Fifth District of New Jersey at Newark, New Jersey.

2. The petitioner, Henry A. Kieselbach, on April 2, 1927, inherited from his father, Henry C. Kieselbach, property consisting of improved real estate located at 293 Atlantic Avenue, Brooklyn, New York, having a fair market value of $50,000.00, apportioned $35,000.00 to land and $15,000.00 to the building and improvements. The area of the land was 2000 square feet.

3. The City of New York in a proceeding entitled "In the Matter of the Application of the City of New York, relative to acquiring title wherever, the same has not been heretofore acquired for the same purpose in fee to the lands, tenements and hereditaments required for the purpose of opening and extending Jay Street from Nassau Street to Fulton Street, Smith Street from Fulton Street to Atlantic Avenue, and Schermerhorn Street from Smith Street to a point about 50 feet east of 3rd Avenue where not heretofore acquired in fee by the City of New York for rapid transit purposes in the Borough of Brooklyn, City of New York," filed on December 30, 1930 in the Supreme Court of the State of New York in and for the Second Judicial District, asked the Court for authority to con-

demn the building and improvements and 1600 square feet of the land, described in Paragraph 2 hereof. The petitioner's particular parcel was designated as Damage Parcel No. 268. An order granting the said application was entered by the said Court on December 30, 1930. It provided: "That the compensation which should justly be made to the respective owners of the property proposed to be taken, be ascertained by this Court, without a jury, and that the cost, and expenses of such improvement be assessed by this Court, in accordance with the resolution adopted by the Board of Estimate and Apportionment on the 6th day of June, 1930."

4. The propose condemnation was pursuant to Sec. 976 of the Greater New York Charter, which is made a part hereof by reference with the same effect as if incorporated herein verbatim.

5. No deposit or other security to cover just compensation was made or provided by the City at the time it filed the said application to condemn or at any other time during the pendency of the Court proceeding.

6. Article 1, Section 7, Paragraph (a) of the Constitution of the State of New York provides that "Private property shall not be taken for public use without just compensation."

7. On July 2, 1931, the taxpayer filed his formal claim for just compensation in the pending condemnation proceedings. On December 16, 1932, the Board of Estimate and Apportionment passed the following resolution:

> "Resolved, That the Board of Estimate and Apportionment, in pursuance of the provisions of section 976 of the Greater New York Charter, as amended, directs that upon the 3d day of January, 1933, the title in fee to the real property

lying within the lines of said Jay street from Nassau street to Fulton street; and Smith street from Fulton street to Atlantic avenue; where not heretofore vested, in the Borough of Brooklyn, City of New York, so required, shall become vested in The City of New York."

8. The condemnation proceeding was tried between March 25, 1933, and February 19, 1935 and on February 17, 1936 the Court entered its tentative decree fixing tentative awards and assessments. This tentative decree was later published. On March 10, 1936, the taxpayer filed objections to the said tentative decree. Hearings were had on the objections of the taxpayer and others on March 23, 1936, and April 3d and 7th, 1936. The amount of the assessment against petitioner was reduced upon consideration of his objections.

9. Thereafter on March 31, 1937, the Court entered a final decree. It provided that the amount awarded to the respective property owners, including the petitioner, constituted and was "the just compensation which the respective owners are entitled to receive from The City of New York."

10. Under the laws of New York, both the City and the petitioner had a right of appeal from this final decree, said appeal to be taken within thirty days after notice of the filing of said final decree. No appeal was taken by the petitioner or by the City with respect to the parcel owned by the petitioner. Payment of $73,246.57, the amount of the award referred to in Paragraph 9 hereof, was made to the petitioner on May 12, 1937. The amount of said payment was computed by adding to the principal amount of $58,000.00, interest thereon as provided by Section 976 of the Greater New York Charter, in the sum of $15,246.57, computed at

the rate of 6% per annum from January 3, 1933 to May 12, 1937, or a total of $73,246.57.

11. The petitioners filed their Federal Income Tax returns for all years on the cash receipts and disbursements basis.

12. The respondent on May 5, 1939, mailed his deficiency notice to the petitioners. The appeal was filed with this Board on June 1, 1939, under Docket No. 98897.

13. In said deficiency notice the respondent segregated $15,246.57 of the amount received by petitioners as just compensation under the final decree referred to in Paragraph 9 and included said amount in ordinary income as interest. The profit on the condemnation of the property was held by the Commissioner to constitute capital gain, and the amount of the capital gain was computed by the respondent to be $4,756.78. The computation of this amount by the respondent is set forth in the deficiency notice at Pages 5 and 6.

14. The cost basis to the petitioners as of April 2, 1927 is $35,000.00 for the land (including 400 feet not taken by condemnation proceedings) and $15,000.00 for the building. The useful life of the building and improvements was forty (40) years from April 2, 1927, the date of acquisition by petitioner.

15. The deficiency for 1937 proposed in the deficiency letter dated May 5, 1939, was paid by the petitioners on May 10, 1940, to the Collector of Internal Revenue at Newark, New Jersey, together with interest in the amount of $365.28, a total of $3,175.10. This deficiency has not been assessed.

16. The deficiency proposed for the year 1936 was paid on October 8, 1938, to the Collector of Internal Revenue at Newark, New Jersey, together with interest thereon in the amount of $1.58, a total of $18.64, but

has never been assessed and there is a deficiency in assessment but not in payment of said amount of $17.08 and interest, in respect of the year 1936.

HARRY FRIEDMAN,
Harry Friedman
JULIEN W. NEWMAN,
Julien W. Newman
Counsel for Petitioners.
J. P. WENCHEL,
Chief Counsel
Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

SUPPLEMENTAL STIPULATION

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true upon the trial of the foregoing case, subject to the right of either party to object to the relevancy or materiality of any of the facts herein stated, and subject further to the right of either party to introduce other and further evidence not inconsistent with any of the facts herein stated:

17. By virtue of the resolution set out in Paragraph 7 of the stipulation of facts, the City of New York took possession of the petitioner's property on January 3, 1933, claiming that by virtue of said resolution title thereto vested in it on January 3, 1933. After January 3, 1933 all rents from the property were collected and retained by the City. The petitioner prior to January 3, 1933 collected $25.00 rent from a tenant applicable to the month of January 3, 1933, but the portion of said collection applicable to the portion of said month from January 3d to January 31st, was paid by the peti-

tioner to the City. The building and improvements were razed by the City in July 1935.

HARRY FRIEDMAN.
Harry Friedman.
JULIEN W. NEWMAN,
Julien W. Newman,
Counsel for Petitioners.
J P. WENCHEL, A. W. C.,
Chief Counsel.
Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

HENRY A. KIESELBACH AND OLGA M. KIESELBACH, PETITIONERS, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 98897. Promulgated April 24, 1941.

1. SALE OR EXCHANGE.—The taking of property by condemnation and the payment of just compensation is a sale or exchange within the meaning of section 117 (a) of the Revenue Act of 1936 and the profit from that transaction is a capital gain.

2. JUST COMPENSATION FOR PROPERTY TAKEN BY CONDEMNATION.—The entire amount received as just compensation for property taken by condemnation is *held* to be the amount realized from the disposition of the property even though the computation by which it was determined included interest on a principal amount from a date prior to the date of actual payment of the award.

3. CAPITAL ASSETS—PERIOD OF HOLDING.—The city of New York condemned property for street purposes and took actual possession on January 3, 1933, under a resolution of the board of estimates and apportionment, which had provided that title in fee to the property should vest in the city on that date. The condemnation proceeding continued for several years thereafter and payment of just compensation was not made and no provision therefor was made until May 12, 1937. *Held*, that, since under the laws of New York title to the property did not pass from the taxpayer

until May 12, 1937, the period of holding for the purpose of section 117 (a) continued until that date.

Harry Friedman, Esq., and *Julien W. Newman, Esq.*, for the petitioners.

Arthur W. Carnduff, Esq., for the respondent.

OPINION.

MURDOCK: The Commissioner determined a deficiency in income tax for the calendar year 1936 in the amount of $17.08 and a deficiency in income tax for the calendar year 1937 in the amount of $2,809.82. There is no issue for decision by the Board in regard to the year 1936. The issues for decision are: (1) Whether the profit realized by the petitioner upon the taking by condemnation of a capital asset is taxable as a capital gain or as ordinary income; (2) if it is a capital gain, whether a portion of the total amount received is taxable as interest; and (3) the period for which the property was held by the taxpayer within the meaning of section 117 (a) of the Revenue Act of 1936. The facts have been stipulated and the Board adopts the stipulated facts as its findings of fact.

Henry A. Kieselbach inherited a piece of property from his father on April 2, 1927. The city of New York, for the purpose of opening and extending certain streets, filed a proceeding in court late in 1930, asking for authority, *inter alia*, to condemn the building and improvements and a certain portion of the land owned by the petitioner. The court on that same day entered an order granting the application and providing that the compensation should be determined by the court. The taxpayer filed his formal claim for just compensation. The board of estimates and apportionment passed a resolution on December 16, 1932, providing, among other things, that the title in fee to the real property in question should become vested in the city on January 3, 1933. The city took possession on

that date. The condemnation proceeding was tried between March 25, 1933, and February 19, 1935. The court entered its tentative decree on February 17, 1936, fixing tentative awards and assessments. The taxpayer, on March 10, 1936, filed objections to the tentative decree. Hearings were held on the objections during March and April of 1936. The amount of the assessment against the petitioner was reduced upon consideration of his objections. The court entered a final decree on March 31, 1937, providing that the amount awarded to the owners of the properties was the just compensation to which they were entitled. Both the city and the petitioner had a right to appeal from this final decree within 30 days. No appeal was taken. The amount awarded to the petitioner was $73,246.57 and that amount was paid to the petitioner on May 12, 1937. That total amount was computed by adding, to a principal amount of $58,000, interest thereon at 6 percent from January 3, 1933. The interest amounted to $15,246.57. No deposit or other security to cover just compensation was made or provided by the city at any time prior to final payment.

The petitioners filed their income tax returns on the basis of cash receipts and disbursements. The Commissioner, in determining the deficiency, held that the amount of $15,246.57 was interest and taxable as ordinary income, while the remainder of the award represented the amount received from the sale or exchange of a capital asset, and that 40 percent, or $4,756.78, of the excess of that amount over the basis for gain or loss on the property was taxable under section 117 (a).

The Commissioner has made the affirmative contention that the taking of the property by condemnation was not a sale or exchange and he erred in treating any of the profit from the transaction as a capital gain. This contention is not only contrary to the general law on the subject of condemnation proceedings but is also

contrary to the previous rulings of the Bureau. See Notice of Deficiency; I. T. 1378, C. B. I–2, p. 26; A. R. R. 4899, C. B. III–1, p. 56. The contention was made apparently as a hedge against the possibility that the Commissioner would not be sustained in the contentions which he was making before the Supreme Court in the *Hammel* and *Electro-Chemical Engraving Co.* cases. The Supreme Court sustained the Commissioner in those cases, *Helvering* v. *Hammel*, — U. S. — (1/6/41); *Electro-Chemical Engraving Co.* v. *Commissioner*, — U. S. — (1/6/41), and held that section 117 applies to forced sales as well as to voluntary sales, so that the loss of a mortgagor on foreclosure is a capital loss. The Board and the Second Circuit Court of Appeals have held that a condemnation proceeding is a sale or exchange within the meaning of section 117, and upon authority of those cases this point is decided for the petitioner. *Estate of Edgar S. Appleby*, 41 B. T. A. 18; *Seaside Improvement Co.* v. *Commissioner*, 105 Fed. (2d) 990; certiorari denied, 308 U. S. 618. Cf. *William Flaccus Oak Leather Co.* v. *Commissioner*, 114 Fed. (2d) 783, wherein the Court of Appeals for the Third Circuit, to which this case would go if appealed, refused to follow *Herder* v. *Helvering*, 106 Fed. (2d) 153, and held that the profits from a fire insurance policy upon a capital asset were received as a result of a sale or exchange and were taxable as capital gain.

The petitioner contends that the Commissioner erred in taxing any part of the award of just compensation as interest. This contention is sustained upon the authority of *Estate of Edgar S. Appleby, supra*, following *Seaside Improvement Co.* v. *Commissioner, supra*, reversing in part a case reported as *Jamieson Associates, Inc.*, 37 B. T. A. 92.

The petitioner next contends that the period for which it held the property, within the meaning of sec-

tion 117 (a), was more than 10 years. He points out that he was on the basis of cash receipts and disbursements and the transaction was not closed for income tax purposes until he received the money on May 12, 1937, which was more than 10 years after the date of acquisition, April 2, 1927. He also argues that the title to the property remained in him until May 12, 1937, when the money was paid to him. The Board stated in *E. F. Blaise*, 42 B. T. A. 1232, that the word "held" in section 117 (a) is synonymous with "own" and the Board is bound by the state rule of property as to ownership. The petitioner cites *Garrison* v. *City of New York*, 88 U. S. 196, to show that under the rule of property in the State of New York the title did not pass until May 12, 1937. The following quotation from the opinion in that case bears out this contention:

> * * * Any declaration in the statute that the title will vest at a particular time, must be construed in subordination to the constitution, which requires, except in cases of emergency admitting of no delay, the payment of the compensation, or provision for its payment, to precede the taking, or, at least, to be concurrent with it.

See also *Bauman* v. *Ross*, 167 U. S. 548, 598, where the Court stated that title to land being taken by condemnation remains in the owners as if no proceedings for condemnation had been had until just compensation has been paid. The respondent has not cited any cases to the contrary or made any argument to indicate that these cases do not correctly state the rule of law in New York. The property was held for more than 10 years.

Decision will be entered under Rule 50.

Arundell, Black & Tyson dissent on the authority of *Helvering* v. *William Flaccus Oak Leather Co.*, —— U. S. —— (Apr. 28, 1941).

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UNITED STATES BOARD OF TAX APPEALS

Docket No. 98897.

HENRY A. KIESELBACH AND OLGA M. KIESELBACH, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

DECISION

The respondent on July 9, 1941, filed a proposed computation, pursuant to the Board's Opinion promulgated April 24, 1941. The petitioner filed a notice of acquiescence to said computation on July 17, 1941. Therefore, it is

ORDERED and DECIDED, that there is an overpayment in income tax for the year 1937 in the amount of $2,538.96, which was paid after the mailing of the notice of deficiency.

(Signed) J. E. MURDOCK, *Member.*

Enter: Entered AUG. 5, 1941.

UNITED STATES BOARD OF TAX APPEALS

Docket No. 98897.

HENRY A. KIESELBACH AND OLGA M. KIESELBACH, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

ORDER

It appearing that the year 1936 was omitted from the Board's Decision of August 5, 1941, it is

ORDERED, that said Decision be amended to include 1936 and to read: "There is a deficiency in income tax

for the year 1936 in the amount of $17.08 and an overpayment for the year 1937 in the amount of $2,538.96, which amount was paid after the mailing of the notice of deficiency."

(Signed) J. E. MURDOCK, *Member.*

Dated—Washington, D. C., August 28, 1941.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

B. T. A. DOCKET NO. 98897

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW,

v.

HENRY A. KIESELBACH AND OLGA M. KIESELBACH, RESPONDENTS ON REVIEW.

PETITION FOR REVIEW

GUY T. HELVERING, Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Third Circuit to review the decision entered by the United States Board of Tax Appeals on August 5, 1941, as amended by its supplemental order dated August 28, 1941, ordering and deciding that there is an overpayment for the year 1937 in the amount of $2,538.96 due Henry A. Kieselbach and Olga M. Kieselbach, respondents on review herein.

The respondents on review, Henry A. Kieselbach and Olga M. Kieselbach, are residents of Montclair, New Jersey, and filed an income tax return for the calendar year 1937 in the office of the Collector of Internal Revenue for the Fifth District of New Jersey, located at Newark, New Jersey, which collection district is within

the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit, wherein this review is sought.

(Signed) SAMUEL O. CLARK, Jr.
Assistant Attorney General.

(Signed) J. P. WENCHEL

RLW

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner on Review.

OF COUNSEL:
CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

CRM/cal
10/14/41

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

B. T. A. DOCKET No. 98897

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW,

v.

HENRY A. KIESELBACH AND OLGA M. KIESELBACH, RESPONDENTS ON REVIEW

NOTICE OF FILING PETITION FOR REVIEW

To: Henry A. Kieselbach, Olga M. Kieselbach, 43 Myrtle Avenue, Montclair, New Jersey.

You are hereby notified that the Commissioner of Internal Revenue did, on the 27th day of October, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review

by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 27th day of October, 1941.

(Signed) J. P. WENCHEL

RLW

J. P. Wenchel,

Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 29 day of October 1941.

HENRY A. KIESELBACH,

OLGA M. KIESELBACH,

Respondents on Review.

CRM/csl
10/14/41

U. S. GOVERNMENT PRINTING OFFICE: 1942

[fol. 42] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7912

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

HENRY A. KIESELBACH and OLGA M. KIESELBACH, Respondents

And afterwards, to wit, the 2d day of March, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable William Clark, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 7th day of April, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 43] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7912

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

HENRY A. KIESELBACH and OLGA M. KIESELBACH

On Petition for Review of the Decision of the United States Board of Tax Appeals

OPINION

(Filed April 7, 1942)

Before Clark, Jones and Goodrich, *Circuit Judges*

GOODRICH, *Circuit Judge:*

The taxpayer, Henry Kieselbach, inherited from his father a parcel of real property in the City of New York on April 2, 1927. In 1930 the City of New York began con-

demnation proceedings in the Supreme Court of New York; an order was entered authorizing the taking of the property by the City and providing that compensation would be determined by the Court. The resolution of the New York Board of Estimate and Apportionment, passed pursuant to § 976 of the Greater New York Charter, provided that fee title of the property should become vested in the City Janu- [fol. 44] ary 3, 1933. The City took possession on this date and rents thereafter accruing were collected by or turned over to it. Following litigation as to the amount of compensation, the court on March 31, 1937 entered a final decree entitling the taxpayer to $73,246.57, computed by adding to the principal sum of $58,000, interest thereon at 6% per annum from January 3, 1933 to May 12, 1937. The amount fixed in the decree was paid to the taxpayer on the latter date. No deposit or security to cover compensation was given by the City prior to final payment.

The case is brought to this court by the Commissioner from the decision of the Board of Tax Appeals. It embraces three questions, involving the application and interpretation of § 117 of the Revenue Act of 1936. That section provides for the taxation of capital gains and losses upon the sale or exchange of capital assets.[1] The first question is

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[1] "(a) General rule. In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

"(b) Definition of capital assets. For the purposes of this title, 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included

whether the gain realized from the condemnation of the taxpayer's property was gain from a sale of a capital asset. The second is whether the amount designated as interest in the condemnation award was part of the price, and therefore [fol. 45] to be taxed as capital gain, or was "true" interest, taxable as ordinary income when received, in 1937. The third concerns itself with the determination of the period for which the taxpayer held this land: is the termination date May 12, 1937, when the price was paid, or January 3, 1933, when the City took fee title and possession? The points will be discussed in the order stated.

Is the transfer of property through condemnation proceedings to be classified as a sale within the meaning of § 117 of the Revenue Act of 1936? The answer to this question will determine whether the increase in value realized by the taxpayer is to be treated as capital gain or ordinary gain, with the corresponding difference as to the base of the tax imposed. The Commissioner makes the suggestion that in view of the statement by the Supreme Court in Helvering v. William Flaccus Oak Leather Co., 313 U. S. 247, 250 (1941),[2] condemnation of property does not effect a sale within § 117. The Commissioner advanced this position solely for the purpose of preserving the point in the event of an adverse decision in a case then pending in the Ninth Circuit. Since the instant case was argued, however, that decision has come down and the holding is squarely to the effect that taking a property by condemnation does amount to a sale within the meaning of the income tax law. Hawaiian Gas Products, Ltd. v. Commissioner of Internal Revenue, — F. (2d) — (C. C. A. 9, 1942). This follows the view of the Second Circuit in Seaside Improvement Co. v. Commissioner of Internal Revenue, 105 F. (2d) 990 (C. C. A. 2, 1939); Commissioner

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in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." 25 U. S. C. A. Int. Rev. Acts, § 117 (a) and (b).

[2] "We can find nothing in this language [i. e., the language of § 112 (f)] or in other sections of the Act which indicates, either expressly or by implication, that Congress intended to classify as 'sales or exchanges' the involuntary conversions enumerated in § 112(f)."

of Internal Revenue v. Appleby's Estate, 123 F. (2d) 700 (C. C. A. 2, 1941) and seems to us, as it did to the courts in the other Circuits, correct, in view of Helvering v. Hammel, 311 U. S. 504 (1941) and Helvering v. Nebraska Bridge Supply & Lumber Co., 312 U. S. 666 (1941). We thus have the happy situation of unanimity of opinion upon [fol. 46] a point by the Commissioner, the taxpayer, the Circuit Courts of Appeals and, we think, the Supreme Court of the United States.

The second point involves more difficulty. The Commissioner seeks to tax as ordinary income, rather than as capital gain, that part of the award designated as "interest". The taxpayer resists this on the ground that the very terms of the New York Charter, under which the compensation decree was issued, label the so-called interest "part of the compensation to which * * * owners are entitled". It is pointed out that such is the settled attitude of the courts with regard to condemnation awards and that the holding contended for here has been announced twice by the Circuit Court of Appeals for the Second Circuit.[3]

The Supreme Court has said several times in cases involving appropriation of land by the United States that the item labelled interest in the award is really part of the "just compensation" to which the property owner is constitutionally entitled.[4] We have no doubt concerning the authority or the correctness of the decisions cited. Whereas before the taking an owner was in possession of a certain piece of land, he has now, as of the time of payment, so many dollars instead. It would be far from "just compensation", if for the period of time during which the in-

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[3] Commissioner of Internal Revenue v. Appleby's Estate, 123 F. (2d) 700, 701 (C. C. A. 2, 1941); Seaside Improvement Co. v. Commissioner of Internal Revenue, 105 F. (2d) 990 (C. C. A. 2, 1939). But note the court's statement, inter alia, in the former case: "* * *, if the matter were tabula rasa not all of the court as now constituted would reach that conclusion."

[4] United States v. Klamath, etc., Indians, 304 U. S. 119 (1938); Shoshone Tribe of Indians v. United States, 299 U. S. 476, 496 (1937); Phelps v. United States, 274 U. S. 341 (1927); Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299 (1923).

dividual had neither payment nor land, he received no additional consideration. But this is not a conclusive treatment of the status of this additional sum for purposes of the Federal income tax. To say that he is entitled to it is not to speak at all with reference to the question of how he is to be taxed upon its receipt. That is a different matter. [fol. 47] The same analysis is equally applicable to those cases which have refused to relieve the government from paying this additional item on the ground that it was interest on an obligation of the government and therefore not collectible, in the absence of a contract to pay.[5] With those decisions too we agree. Some of them have reached the result indicated by language similar to that found in the cases cited above. Others have adopted the view that this was not the type of obligation to which the statute in question was meant to apply. Be that as it may, the significant factor is that a decision which denies the controlling effect of the "interest" statute upon the question of the plaintiff's right to compensation for the delay in payment does not at the same time answer the problem of how he is to be taxed upon it when he gets it. Again, the latter is another matter. This is not one of those cases, nor is our conclusion determined by language used in those instances where the court was dealing with the problem of

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[5] 28 U. S. C. A. § 284. Phelps v. United States, 274 U. S. 328 (1927); Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299 (1923).

Another group of cases involves what is now § 22(b)(4) of the Internal Revenue Code, 26 U. S. C. A., which exempts from taxation interest upon the obligations of the state or federal governments. Those decisions are to the effect that the additional payments for condemnation awards are not interest within the purview of the revenue acts. Holley v. United States, — F. (2d) — (C. C. A. 6, 1942); United States Trust Co. of N. Y. v. Anderson, 65 F. (2d) 575 (C. C. A. 2, 1933); Posselius v. United States, 31 F. Supp. 161 (Ct. Cl. 1940); Williams Land Co. v. United States, 31 F. Supp. 154 (Ct. Cl. 1940). Here, too, the holdings are not at all determinative of the issue in the instant case, because the problem there was the scope of the exemption provision. Cf. American Viscose Corp. v. Commissioner of Internal Revenue, 56 F. (2d) 1033 (C. C. A. 3, 1932).

what makes up "just compensation". Nor do we think the answer is indicated by another group of cases involving awards by the German Mixed Claims Commission where considerations irrelevant here were prevailing there.[6] The decisions from the Second Circuit cited above are in point. But the matter is tabula rasa in this court. With great [fok 48] deference we believe the answer to be contrary to that reached by the Second Circuit.

The nature of interest in an eminent domain case is stated in 4 Sutherland on Damages (4th Ed. 1916) 4149 as follows: "* * * on general principles interest should be given from the time when the principal should be paid, or, in other words, from the time the landowner was entitled to compensation * * * [Interest] is given, not strictly as damages, but * * * as an equitable mode of compensating the owner for the unnecessary delay in ultimately ascertaining the amount he is entitled to be paid * * *".[7] This seems to us correct. We think the interest, while part of "just compensation", was a payment to the property holder which compensated him for the delay in paying him for his land. Our first impression on the question is thus borne out. The sum of money the taxpayer received was designated as a round sum in principal with interest computed from the date of taking to the date of payment. It seems clear, even apart from everything else, that the principal sum was capital, and the part specified as interest, as we have already said, was compensation for the period during

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[6] Helvering v. Drier, 79 F. (2d) 501 (C. C. A. 4, 1935); Commissioner of Internal Revenue v. Speyer, 77 F. (2d) 824 (C. C. A. 2, 1935); Drier v. Helvering, 72 F. (2d) 76 (C. A. D. C. 1934). In the later case, the court declined to tax the interest as income because the total payment made from German sources would not restore the 1913 value of the property to the taxpayer. In the first two cases it was concluded that until the principal amount of the award had been fully received no part of the payment was to be allocated to interest.

[7] Also "When the time of taking is ascertained, interest on the amount of damages given follows from that date". 3 Sedgwick, Damages (9th Ed. 1912) § 1179(a). Note (1938) 33 Ill. L. Rev. 361. But cf. (1940) 39 Mich. L. Rev. 169.

which the property owner had neither land nor money. It is, therefore, for income tax purposes, ordinary income, not capital gain.

We come now to the third and final point, involving the period of time during which the taxpayer "held" the property. There is no dispute as to when he acquired it; the difference of opinion comes as to the date at which he ceased to hold it. The Board of Tax Appeals held that date to be May 12, 1937, the day the taxpayer got his [fol. 49] money. If that is correct he held the property for more than ten years and is to be taxed upon only 30% of the capital gain.

Upon this point we disagree with the Board of Tax Appeals. The taxpayer no longer "held" this property after he ceased to be the owner of it. Shillinglaw v. Commissioner of Internal Revenue, 99 F. (2d) 87 (C. C. A. 6, 1938) cert. den. 306 U. S. 635 (1938). When did he cease to be the owner? According to the terms of the Greater New York Charter it was on January 3, 1933, at which time title was purportedly vested in the City. At this time, too, the City took possession and thereafter collected the rents. This is the date at which the taxpayer ceased to hold the property, unless the following of the provisions of the charter violates his constitutional rights.

The taxpayer says, however, that it would do so. It is stipulated in the facts that no deposit or security to cover compensation was given by the City prior to final payment. That being so, he contends, a taking prior to payment would be a violation of the provision of the constitutions of both the United States and New York that "private property shall not be taken for public use without just compensation". He cites Garrison v. The City of New York, 88 U. S. 196 (1874) and Bauman v. Ross, 167 U. S. 548 (1897). It is quite true that in the former case the condemnation decree purported, by its terms, to be "final and conclusive" and that judicial confirmation thereof resulted in passing the fee title to the City of New York. But the question there was whether or not those proceedings were "so far final and conclusive of the right of the City to the property and of the plaintiff to the award, that neither were subject to any legislative or judicial interference". The holding on this point casts no shadow on the issue of the time as of which the property owner ceased to hold his land for purposes of the Federal income tax. The same may be said, likewise, of Bauman v. Ross.

So far as the New York law is concerned, Kahlau v. State of New York, 223 N. Y. 383, 389, 119 N. E. 883, 885 [fol. 50] (1918) answers the taxpayer's point. The court said that the limitation of the New York constitution "does not deny the power of the state to take to itself • • • the absolute title to specific private property, provided the statute recognizes the absolute right of the owner, upon the taking of the property, to just compensation and makes provision for the prompt determination and payment of such compensation from the public funds". Such provision for compensation is made in the charter above referred to with the appropriate appeals to preserve the rights of both parties.

That such safeguards are sufficient protection of the property owner's rights under the Constitution of the United States we find settled by adequate Supreme Court holdings to the effect that it is within constitutional limits to provide for the seizure, by eminent domain, of private property without simultaneous payment of "just compensation", as long as "adequate provision be made for compensation". Among these cases are Phillips v. Commissioner of Internal Revenue, 283 U. S. 583, 597 (1931); Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, 677-678 (1923); Hays v. Port of Seattle, 251 U. S. 233, 238 (1920); Bragg v. Weaver, 251 U. S. 57, 62 (1919); Adirondack Ry. Co. v. New York State, 176 U. S. 335, 349-350 (1900); Sweet v. Rechel, 159 U. S. 380 (1895).[8]

[8] In the case last cited, the Supreme Court said, with reference to a case cited to it, that it "• • • by no means controverts the doctrine that the legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which under the constitution he is entitled, and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation". (p. 404).

We conclude, therefore, that the taxpayer ceased to hold this property on January 3, 1933. His period of holding, [fol. 51] therefore, comes within that which is over five years and less than ten years and the tax on his capital gain is to be assessed accordingly.

The decision of the Board of Tax Appeals is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Judge Clark did not participate in the decision of this case.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 52] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7912

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

HENRY A. KIESELBACH and OLGA M. KIESELBACH, Respondents

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed, and the case is remanded to the said Board of Tax Appeals for further proceedings not inconsistent with the opinion of this court.

Herbert F. Goodrich, Circuit Judge.

April 7, 1942.

Endorsements: Order Reversing Decision of the Board of Tax Appeals. Received & Filed Apr. 7, 1942. Wm. P. Rowland, Clerk.

[fol. 53] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Petitioner, as constituting the portions of the record before this court at argument, and proceedings in this court in the case of Commissioner of Internal Revenue, Petitioner, vs. Henry A. Kieselbach and Olga M. Kieselbach, Respondents, No. 7912, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 4th day of June in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-sixth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 54] IN THE SUPREME COURT OF THE UNITED STATES

HENRY A. KIESELBACH and OLGA M. KIESELBACH, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition for Certiorari to the Circuit Court of Appeals for the Third Circuit.

Stipulation

Subject to this Court's approval, it is hereby stipulated that, for the purpose of the petition for a writ of certiorari, the printed record herein may consist of the following:

(1) Appendix B to the brief of the Commissioner of Internal Revenue filed in the Circuit Court of Appeals for the Third Circuit.

(2) The proceedings before said United States Circuit Court of Appeals.

It is further stipulated that the petitioners shall cause the Clerk of the Circuit Court of Appeals to forward to the

Clerk of the Supreme Court the original record on file in his office and that either party may refer to such original record in the petition or in the briefs before this Court, and if the petition for certiorari is granted, a record shall be printed under the supervision of the Clerk of the Supreme Court which shall consist of the proceedings in the Circuit Court of Appeals and such portions of the original record transmitted from the Circuit Court of Appeals to this Court as the parties shall designate, provided that either party may refer to any portions of the certified record which are not printed under the designations of the parties.

Harry Friedman, Attorney for Petitioners. Charles Fahy, Solicitor General, Attorney for Respondent

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[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the first question presented by the petition and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 184

HENRY A. KIESELBACH and OLGA M. KIESELBACH, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. —.

HENRY A. KIESELBACH and OLGA M. KIESELBACH, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Henry A. Kieselbach and Olga M. Kieselbach pray that a writ of certiorari be issued to review the decision of the United States Circuit Court of Appeals for the Third Circuit, entered in the above cause on April 7, 1942, reversing in part the decision of the United States Board of Tax Appeals.

No review is asked of the part of the decision which affirmed the Board of Tax Appeals.

OPINION BELOW.

The opinion of the Board of Tax Appeals is reported at 44 B. T. A. 279, and may be found in Appendix B. (R. 33-37) The opinion of the Circuit Court of Appeals is reported in 127 F. (2d) 359. (R. 42-50)

JURISDICTION.

The decision of the Circuit Court of Appeals was entered on April 7, 1942. The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

The petitioners on May 12, 1937, received $73,246.57 under an award of "just compensation" for property taken by eminent domain by the City of New York. The award was computed by adding to the principal sum of $58,000.00, the sum of $15,246.57 representing "interest" made a part of the award by Sec. 976 of the Greater New York Charter, the statutory authority for the condemnation proceedings. The property condemned was acquired by one of the petitioners on April 2, 1927. The City took possession on January 3, 1933. (R. 28-31)

The Board of Tax Appeals held that (1) the condemnation was a "sale", the profit on which was taxable as capital gain, (2) the "interest" was part of the award and taxable as capital gain and (3) the petitioners "held" the property for more than ten years.

The Circuit Court of Appeals for the Third Circuit affirmed the Board of Tax Appeals on the question whether the condemnation was a sale and reversed the Board on the other two holdings. The questions are:

(1) Whether the part of the award of just compensation computed by the use of an interest factor is taxable as capital gain or as ordinary income.

(2) Whether the holding period for capital gain purposes extends to the date of payment, where possession is taken prior thereto.

STATUTES INVOLVED.

The statutes involved are printed in Appendix A, infra, page 6.

STATEMENT.

Henry A. Kieselbach inherited a parcel of property from his father on April 2, 1927. The City of New York, for the purpose of opening and extending certain streets, filed a proceeding in court late in 1930, asking for authority, inter alia, to condemn the building and improvements and a certain portion of the land owned by Mr. Kieselbach. The court on that same day entered an order granting the application and providing that the compensation should be determined by the court. (R. 29) The petitioner filed his formal claim for just compensation. On December 16, 1932 the Board of Estimate passed a resolution purporting to vest the title in fee to the real property in the City as of January 3, 1933. (R. 29) The City took possession on that date. (R. 34) The condemnation proceeding was tried between March 25, 1933 and February 19, 1935. The court entered its tentative decree on February 17, 1936, fixing tentative awards and assessments. The petitioner, on March 10, 1936, filed objections to the tentative decree. Hearings were held on the objections during March and April of 1936. The amount of the assessment against the petitioner was reduced upon consideration of his objections. The court entered a final decree on March 31, 1937, providing that the amount awarded to the owners of the properties was the "just compensation" to which they were entitled. Both the City and the petitioner had a right to appeal from this final decree within thirty days. No appeal was taken. (R. 30) The amount awarded to the petitioner was $73,246.57 and that amount was paid to the petitioner on May

12, 1937. The total award was computed by adding to the principal amount of $58,000, statutory "interest" thereon at 6 per cent from January 3, 1933, amounting to $15,246.57. (R. 30-31) No deposit or other security to cover just compensation was made or provided by the City at any time prior to final payment. (R. 29)

The petitioners filed their income tax returns on the basis of cash receipts and disbursements. (R. 31)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that the portion of the just compensation designated as "interest" was taxable as ordinary income, rather than as capital gain.

(2) In holding that the petitioners did not "hold" the property for more than ten years.

REASONS FOR GRANTING WRIT.

(1) The decision of the Circuit Court of Appeals is in direct conflict with two decisions of the Circuit Court of Appeals for the Second Circuit on the identical question; *Seaside Improvement Co.* v. *Commissioner*, 105 F. (2d) 990, (C. C. A. 2; 1939); *Commissioner of Internal Revenue* v. *Appleby's Estate*, 123 F. (2d) 700, (C. C. A. 2; 1941). This direct conflict is recognized in the opinion. The Court said:

> "The decisions from the Second Circuit cited above are in point. But the matter is *tabula rasa* in this Court. With great deference we believe the answer to be contrary to that reached by the Second Circuit." (R. 47)

This decision of the Third Circuit has not impressed the Board and it continues to follow the decisions from the Second Circuit. See *Brown* v. *Commissioner*, 47 B. T. A. No. 22, decided June 16, 1942.

(2) The decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court, holding that "interest" in a condemnation award is a part of the "just

compensation" to which the owner is entitled. *United States* v. *Klamath, etc. Indians*, 304 U. S. 119 [1938]; *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 496 [1937]; *Phelps* v. *United States*, 274 U. S. 341 [1927]; *Seaboard Airline Ry. Co. v. United States*, 261 U. S. 299 [1923].

(3) The decision of the Circuit Court of Appeals is in conflict with applicable decisions of the other Circuit Courts of Appeal and the Court of Claims. *Holley* v. *United States*, 124 F. (2d) 909, (C. C. A. 6, 1942); *United States Trust Co. of New York* v. *Anderson*, 65 F. (2d) 575 (C. C. A. 2, 1933) *cert. denied*, 290 U. S. 683; *Posselius* v. *United States*, 31 F. Supp. 161 (Ct. Cl. 1940); *Williams Land Co.* v. *United States*, 31 F. Supp. 154 (Ct. Cl. 1940); *Helvering* v. *Drier*, 79 F. (2d) 501 (C. C. A. 4, 1935), *Commissioner of Internal Revenue* v. *Speyer*, 77 F. (2d) 824 (C. C. A. 2, 1935; *cert. denied*, 298 U. S. 631; *Drier* v. *Helvering*, 72 F. (2d) 76 (C. C. A., D. C. 1934).

(4) The decision of the Circuit Court of Appeals on the question of the period the property was held is one of first impression and is in conflict with applicable decisions of this Court. *Garrison* v. *City of New York*, 88 U. S. 196; *A. F. & G. Realty Corp.* v. *City of New York*, 313 U. S. 540.

Wherefore it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX A.

Revenue Act of 1936, c. 690, 49 Stat. 1648.

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

* * * * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a). *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer

if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(c) *Determination of Period for which Held.*—For the purpose of subsection (a)—

(1) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(2) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(3) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain was recognized to the distributee under the provisions of section 112 (g) of the Revenue Act of 1928 or the Revenue Act of 1932, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(4) In determining the period for which the taxpayer has held stock or securities the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of this Act or section 118 of the Revenue Act of 1928 or the Revenue Act of 1932 or the Revenue Act of 1934, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, there shall be included the period for which he held the stock or securities the loss from the sale or other disposition of which was not deductible.

IN THE

Supreme Court of the United States

October Term, 1942.

No. 184.

HENRY A. KIESELBACH AND OLGA M. KIESELBACH,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONERS.

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BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (R. 33-37) is reported at 44 B. T. A. 279. The opinion of the Circuit Court of Appeals for Third Circuit (R. 42-50) is reported at 127 F. (2d) 359.

JURISDICTION.

The judgment of the circuit court of appeals was entered April 7, 1942. (R. 42) Petition for a writ of certiorari was filed June 27, 1942, and was granted October 12, 1942, limited to the first question presented by the petition for certiorari. (R. 52) The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the part of the award of just compensation computed by the use of an interest factor is a part of the selling price of the property and taxable as capital gain or is a separate and distinct item of income, taxable as ordinary income.

STATUTES INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 28-31.

STATEMENT.

The petitioner, Henry A. Kieselbach, inherited a parcel of property from his father on April 2, 1927. The City of New York, for the purpose of opening and extending certain streets, filed a proceeding in court late in 1930, asking for authority, *inter alia*, to condemn the building and improvements and a certain portion of the land owned by the petitioner. The court on that same day entered an order granting the application and providing that the compensation should be determined by the court. (R. 29) The petitioner on July 2, 1931, filed his formal claim for just compensation. (R. 29) On December 16, 1932, the Board of Estimate passed a resolution purporting to vest the title in fee to the real property in the City as of January 3, 1933. (R. 29) The City took possession on that date. (R. 34) The condemnation proceeding was tried between March 25, 1933 and February 19, 1935. The court entered its tentative decree on February 17, 1936, fixing tentative awards

and assessments. The petitioner on March 10, 1936, filed objections to the tentative decree. Hearings were held on the objections during March and April of 1936. The amount of the assessment against the petitioner was reduced upon consideration of his objections. The court entered a final decree on March 31, 1937, providing that the amount awarded to the owners of the properties including petitioner was the just compensation to which the respective owners were entitled to receive from the City. The amount awarded to the petitioner was $73,246.57, which was paid on May 12, 1937. The total award was computed by adding to a principal amount of $58,000 "interest" as provided by Sec. 976 of the Greater New York Charter, at 6 per cent from January 3, 1933, amounting to $15,246.57. (R. 30-31) The basis to the petitioner was $41,866.25, the attorney's fees and assessments were $3,304.31 and the net gain on the sale of the property was $28,076.01. (R. 22)

The petitioners in their joint original return for the year 1937 reported the net gain or profit on the sale of the property as capital gain, limiting the taxable portion to 30 per cent under Sec. 117(a) of the Revenue Act of 1936. The Commissioner of Internal Revenue on May 5, 1939 proposed a deficiency against the petitioners in the amount of $2,826.90, based upon the separation of the gain into two parts and the taxing of $15,246.57 thereof as ordinary income (R. 38), and the inclusion in income of 40 per cent of the balance of the capital gain instead of 30 per cent as reported in the return. The petitioners appealed from this determination to the United States Board of Tax Appeals. (R. 3) The Commissioner in an amended answer asserted an additional deficiency in the amount of $2,089.67 upon the ground that the condemnation was not a sale of the property within the meaning of Sec. 117 (a) and that the entire gain was ordinary gain and not capital gain. (R. 44)

The Board of Tax Appeals held (1) that the taking of the property by condemnation was a sale within the meaning of Sec. 117 (a) and the profit from the sale taxable as

capital gain, (2) that the entire amount received as just compensation for property was the amount realized from the disposition of the property even though the computation by which it was determined included so-called "interest," and (3) that 30 per cent of the capital gain should be included in income as the petitioner held the property for a period of more than 10 years, complete title, under the laws of New York, not passing until May 12, 1937. (R. 61)

The Commissioner filed a petition for review to the Circuit Court of Appeals for the Third Circuit and that court affirmed the Board on the first question, namely, that a transfer of property through condemnation proceedings is a "sale" within the meaning of Sec. 117 (a). It reversed the Board on the other two questions, holding (1) that the so-called "interest" used in computing the just compensation was taxable as ordinary gain and (2) that the petitioners held the property for less than ten years.[1]

The petition for a writ of certiorari was filed on the latter two questions. It was granted on October 12, 1942, limited to the first question.

SUMMARY OF ARGUMENT.

The entire amount received by the petitioners from the City of New York was compensation for their property. The petitioners completed a single transaction in which a single net capital gain was realized. The net gain on the condemnation of property is admittedly taxable as capital gain. The decision of the circuit court of appeals separates the net gain into two parts, taxing part as capital gain, after allowing expenses and assessment against that part, and part as ordinary income with no allowance for expenses against the ordinary income. There is no basis in law for the separate taxation of a single gain on two different bases.

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[1] The case was argued before Circuit Judges Clark, Jones, and Goodrich (R. 42). Judge Clark did not participate in the decision (R. 50).

The so-called "interest" included in the award is an integral part of the just compensation. It is not a separate item of taxable interest. It is paid to the property owner not as a penalty, or as a statutory award, but as part of the lawful and necessary full compensation for the property taken.

The usual import of the term interest within the revenue laws is the amount which one has contracted to pay for the use of borrowed money. It does not include payment made as a part of the purchase or sales price of property. In condemnation proceedings, so-called "interest" is merely an element used in the determination of the just compensation.

The courts and the Commissioner have refused to segregate so-called "interest" included in either the sales or purchase price of property for income tax purposes. This has been the long established administrative rule. This Court in analogous cases has refused to segregate deductible taxes and expenses included in the purchase price of property. The present administrative rule, GCM 20322 (CB 1938-2 p. 167), supported by excellent authorities, is that *the various steps incident to a condemnation project, "including the condemnation award for the property taken, the award for severance damages to and a special benefit assessment levied against the remaining portion of the plot or parcel of real estate affected, constitute a single proceeding, the results of which are to be calculated as an entirety for Federal income tax purposes."*

The decisions of the Second Circuit in *Seaside Improvement Co.* v. *Commissioner*, 105 F. (2d) 990, certiorari denied on other issues, 308 U. S. 618, and *Commissioner* v. *Appelby's Estate*, 123 F. (2d) 700, with which the decision below is in direct conflict, are in agreement with precedent and sound in principle. The Second Circuit correctly applied the doctrine of the decisions of this court as to the nature of "interest" allowed as a part of damages in a condemnation award, and decisions of other circuits refusing

to tax such "interest" as a separate and distinct item of income, apart from the award itself. The Board of Tax Appeals is presently following the Second Circuit.

The circuit court of appeals failed to follow the settled rule of this court that the compensation in eminent domain cases includes "interest," not as interest per se, but as a part of the damages awarded for the taking of the property. It is in conflict with decisions of other circuit courts of appeal which have refused to tax the so-called "interest" on a different basis than the award itself. The principle of the decision below will result in taxation of part of the proceeds as ordinary income even in cases in which in reality a loss is sustained. It will result in difficulty of administration of the statute, and is contrary to the present administrative rule which treats the various steps incident to a condemnation proceeding as a single taxable event.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Third Circuit should be reversed and the decision of the Board of Tax Appeals be affirmed.

ARGUMENT.

I.

The Entire Amount Received by Petitioners from the City of New York Was Compensation for Their Property.

The statute under which the condemnation proceedings took place permits the city to acquire "such interest in real property as will promote public utility" (Sec. 970, R. 9). The compensation to owners of real property to be acquired * * * shall be ascertained by the Supreme Court and the City must apply to the Court "to have compensation which should be justly made to the respective property owners of the real property proposed to be acquired, ascertained and determined by said Court * * *." There are provisions permitting the City to take possession upon adoption of a resolution by the Board of Estimate prior to the final decree, as was done in this case. The legislature was not

unmindful of the constitutional requirements that the compensation must be the fair and full equivalent of the property taken, so it was provided that an additional sum computed by the use of interest at legal rates should be added *"as part of the compensation to which such owners are entitled."*

The property owners would have been entitled to this additional sum without the provisions of Section 976. They had a constitutional right to it as a part of the award.

The order granting the City's petition of condemnation provided "that the compensation which should justly be made to the respective owners of the property proposed to be taken, be ascertained by the Court * * *." (R. 57) The proceedings which followed were to determine "the compensation which should justly be made to the owners of the property * * *" including petitioner. The petitioner's formal claim was for "just compensation in the pending condemnation proceedings." (R. 57 par. 7)

The final decree did just that and nothing more. It awarded the property owners, including petitioner "the just compensation which the respective owners are entitled to receive from the City of New York." (R. 57, 58)

Only one sum was awarded and paid to the petitioners. The award was for "just compensation." There was no payment to the petitioner for the use of his money. No final determination of the amount due him was made until the final decree on March 31, 1937. The City took his property and the final decree fixed the "just compensation" for it, and not for the use of his money.

Thus it will be seen that petitioner asserted a claim in the condemnation proceedings for compensation for the property, and was awarded and paid the "just compensation which the respective owners were entitled to receive from the City of New York." The component elements used by the court to determine the just compensation cannot change the character of the total compensation paid to petitioner for the property. Taxation is a practical

matter, and "If the mere designation of a part of the sales price of an instrument as interest was sufficient to identify such part as interest, there might be some merit in the argument advanced, but terminology alone cannot make out of the sales price of an article something that it is not." *Anderson & Co.* v. *Commissioner*, 6 B. T. A. 713, 716. Form and terminology must be subordinated to substance. *Helvering* v. *Le Gierse*, 312 U. S. 531, 85 L. Ed. 996.

II.

The Petitioners Completed a Single Transaction in the Taxable Year on Which a Single Capital Gain Was Realized.

The decision of the circuit court of appeals segregated the just compensation the petitioners received from the City of New York for their property in a single transaction into two types of income and included the gain on that single transaction in income partly as ordinary interest income under Sec. 22(a) and the balance as capital gain limited to the percentage includible in gross income under Sec. 117 (a).

The case arises out of a single taxable event—A compulsory sale of property, as a result of which the petitioners' property was taken by the City of New York. Gains on the condemnation of property are capital gains.[2] The just compensation was determined under the New York statutes.[3] The price fixed as just compensation for property may be affected by many elements such as present

[2] The circuit court of appeals correctly held that gain on condemnation of property is taxable as capital gain. This has been the administrative rule since the Revenue Act of 1921, the first to tax capital gain on a basis different than ordinary income. I. T. 1372 (11-1 C. B. 26) The respondent does not raise the question in this court. It was raised by the taxpayer in Hawaiian Gas Products Company v. Commissioner (No. 231), certiorari denied by this Court October 12, 1942.

[3] Sec. 970 and Sec. 976 of the Greater New York Charter are printed in the Appendix, pp. 29-31.

worth of future rents, cost of reconstruction, desirability of location, need of purchaser for the property, value of money, marketability, terms of payment and even sentiment of either purchaser or seller.[4] Because the payment is not contemporaneous with the taking the New York statute, in accord with the requirements of the Fifth Amendment and the New York State Constitution, requires that so-called "interest" be awarded not as a penalty but as an incident to the ownership of the property "as part of the compensation to which such owners are entitled." (Sec. 976, *infra* p. 30.)

"Gains • • • from sales or other dealings in property • • •" are included in gross income under Sec. 22(a) of the Revenue Act of 1936, but by Sec. 117(a) the gain or loss on the sale or exchange of property constituting a capital asset is limited to percentages dependent upon the period the taxpayer held the asset. The property here involved was a capital asset and Sec. 117 has been applied to a part of the gain.

The principle underlying the special taxation of capital gains is that capital gain, unlike most other income, accrues over a period of years, and it is, therefore, inequitable to tax such gain at progressive rates in the particular year of realization. This principle is violated by the separation

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[4] In speaking of factors to be taken into consideration in fixing just compensation, this court said in Brooks-Scanlon Corp. v. United States, 265 U. S. 106,

> "The value of such ships at the time of requisition, and the then probable value at the time fixed for delivery, the contract price, the payments made and to be made, the time to elapse before completion and delivery, the possibility that by reason of the Government's action in control of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimant lost by the taking, that is, the sum which will put it in as good a position pecuniarily as it would have been in if its property had not been taken."

of the gain on a single sale of a capital asset and the inclusion of part of the gain in income as ordinary income.

If there were any doubt as to the intent or meaning of Sec. 117, it should be construed favorably to the taxpayer. *McFeely* v. *Commissioner*, 296 U. S. 101, 80 L. Ed. 84.

III.

The So-Called "Interest Included in the Award is an Integral Part of the Just Compensation. It is Not a Separate Item of Taxable Interest.

The so-called "interest" is a capital payment.

Art. 1-Sec. 7 of the Constitution of the State of New York in the same language as the Fifth Amendment to the Federal Constitution, provides that "private property shall not be taken for public use without just compensation." (R. 29) This means that the owner must be made whole. It means that the compensation to which the owner is entitled is the "full and perfect equivalent of the property taken." *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 327; *Seaboard Air Line Railway Co.* v. *United States*, 261 U. S. 299, 67 L. Ed. 664.

The New York condemnation statute, in common with other statutes similarly worded, is calculated to work great hardship, and domain exercised under it has frequently bankrupted property owners. The property is taken without any contemporaneous compensation. Owners using their property for a home or for business, or even for lease are deprived of all and receive nothing. Then follows litigation, which is of a character likely to be protracted—in this case from 1930 to 1937. Title must be elaborately proved, and experts testify at length to high and low values. Eventually, the court determines the tentative value as best it may. That, however, is the value determined at a date long passed the date of taking the title, when the owner is deprived of his property. Quite obviously that, at a later date, is not "just compensation." A revaluation as of the later date is impossible because that would involve new liti-

gation for a new determination and so on *ad infinitum*. Hence, it becomes necessary, in order to arrive at a practical way to estimate just compensation at the date of payment to take the value of the property at the time of taking as determined by the court, and then to award "interest", not, in any sense, as an accrual upon the value at the time of taking, but as an integral part of the just compensation for the property guaranteed by the Constitution as of the time when, after delays of litigation, the City is finally called upon to pay.

People ex rel. Central Trust Co. v. Stillings, 136 App. Div. 438, 441—affirmed 198 N. Y. 504.
Matter of Minzesheimer, 144 App. Div. 576-579, affirmed an opinion below. 204 N. Y. 370.
Matter of City of New York, 222 N. Y. 370.
Matter of Starr, 198 App. Div. 859, 865, affirmed, 236 N. Y. 592.

In the *Matter of Starr*, the court said that the owner

> "is entitled to interest in question, not as a penalty or as a statutory award, but as part of the lawful and necessary full compensation for the property taken."

The amount called "interest" so-called only because interest is the yardstick by which additional compensation is measured, is part of the corpus of the award of just compensation.[5] It should not be taxed as ordinary income merely because interest factors are used to compute the ad-

[5] Cf. "Federal Eminent Domain" a Manual prepared in Lands Division of the Department of Justice, under the direction of the Attorneys General Homer Cummings, Frank Murphy and Robert H. Jackson, pp. 853-854.

"Sec. 120 A • • • Statutory provisions which prohibit interest against the United States are held inapplicable on the theory that interest is charged, not as interest, but as the amount necessary to produce a full equivalent to the value of the land paid contemporaneously with the taking. • • •

"The right to interest, as affecting the measure of 'just compensation' guaranteed by the Fifth Amendment, involves a constitutional right and therefore is substantive and not procedural."

ditional capital payment received by the owner upon the involuntary conversion of his property. It should only be taxed when there is a gain on the entire transaction.

IV.

The So-Called "Interest" is Not Interest Within the Meaning of Section 22 (a) of the Revenue Act of 1936.

This Court has considered the meaning of the term "interest" under the provisions of the revenue acts relating to deductions. It has refused to include within the scope of the deduction any item not a payment for the use of borrowed money holding that "the usual import of the term 'interest' within the revenue act is the amount which one has contracted to pay for the use of borrowed money." *Old Colony Railway Co.* v. *Commissioner*, 284 U. S. 552, 76 L. Ed. 484 (1937) and *Deputy* v. *duPont*, 308 U. S. 488, 84 L. Ed. 416 (1939).

In *Old Colony Railway Co.* v. *Commissioner, supra*, an allocable portion of premiums on bonds was not considered interest under Sec. 213 of the Revenue Act of 1921.

In *Deputy* v. *duPont, supra*, the taxpayer was obligated to return stock in kind within ten years and in the interim to pay to the lender of this stock all dividends declared and paid on the shares. The taxpayer sought to deduct an amount of $567,648 being an amount equivalent to the dividends received and $80,063.56 the taxes on the lender by reason of the payment, on the ground, among others, that it was a payment of "interest." This Court denied this claim stating:

> "There remains respondent's contention that these payments are deductible under § 23 (b) as 'interest paid or accrued . . . on indebtedness'. Clearly respondent owed an obligation to the Delaware Company. But although an indebtedness is an obligation, an obligation is not necessarily an 'indebtedness' within the meaning of § 23 (b). Nor are all carrying charges 'interest'. • • •

> "It is not enough, as urged by respondent, that 'interest' or 'indebtedness' in their original classical context may have permitted this broader meaning. We are dealing with the context of a revenue act and words which have today a well-known meaning. In the business world 'interest on indebtedness' means compensation for the use or forbearance of money. In absence of clear evidence to the contrary, we assume that Congress has used these words in that sense."

The dissenting opinion of Justice Roberts, in which Justice McReynolds joined, agreed that the payment was not "technically interest".

In the present case, the mere designation of part of the award as "interest" does not classify it as interest under Sec. 22 (a) of the Revenue Act of 1936. It is received as part payment for the property and does not come within the usual import of the term "interest".

V.

The Rule that a Deduction is Not Allowable Where the Interest or Other Deductible Expenses Are Made a Part of the Purchase Price of the Property Should Govern by Analogy.

The converse of the situation involved here has often been before the courts in tax cases. A taxpayer may purchase property on the installment basis or possession may be delivered with payment deferred to a later date. The courts have refused to allow the purchaser to segregate the portion of the price computed by the use of an interest factor even though the amount paid is denominated "interest", if in fact it was a means of adjusting the purchase price of the property:

Hundahl v. *Commissioner*, 118 F. (2d) 349 (C. C. A. 5th).

Henrietta Mills v. *Commissioner*, 52 F. (2d) 931 (C. C. A. 4th).

Pratt-Mallory Co. v. *United States*, 12 F. Supp. 1020 (Ct. Cl. 1936).

Daniel Brothers Co. v. *Commissioner*, 28 F. (2d) 761 (C. C. A. 5th).
Anderson & Co. v. *Commissioner*, 6 B. T. A. 713.

The principle of these authorities is the long established administrative rule. In I. T. 3254 (1939—1 C. B. p. 98) the Commissioner relying upon that rule held that finance charges paid in connection with the purchase of property, although denominated interest, are not deductible as interest where such amounts are part of the purchase price of the property.

This is a sound administrative rule applicable to both sellers and purchasers.

This Court has applied this rule to a related problem, namely, adjustment for taxes on property at the date of purchase. *Magruder* v. *Supplee*, (316 U. S. 394), 86 L. Ed. Ad. Op. 1025, decided May 25, 1942.

Taxpayer purchased real estate in Baltimore. State and City taxes for current year had not been paid at the date of purchase. The purchase contract provided for the apportionment of the taxes, the purchaser being allowed a credit for the taxes accrued to the date of settlement. Purchaser later paid the taxes and claimed the portion of the taxes allocable to the period after date of settlement. The Commissioner held that the local taxes were merely part of the cost of the property and were therefore capital. This Court sustained the Commissioner in his refusal to allow a deduction for taxes, holding that the payment of the taxes by the purchaser is nothing but a part of the payment for an unencumbered title.

The principle of the Supplee decision is that it is not permissible for tax purposes to segregate the purchase or sales price of property into component elements of the price. All amounts paid or received for property are capital payments. The "interest" included as an integral part of the condemnation award is a part of the price paid by the City for the property.

In *Helvering* v. *Winmill*, 305 U. S. 79, 83 L. Ed. 52, this Court had before it a case in which the taxpayer was en-

gaged in the business of buying and selling securities. He deducted from his income brokerage commissions paid and incurred in purchasing securities and claimed the deduction thereof as "an ordinary and necessary expense paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered."

This Court held that "the broker's purchase commission here constituted *a part of the acquisition cost of the securities involved*, and are not allowable to the taxpayer as a deduction from gross income under Sec. 23 (a) of the Revenue Act of 1932."

This is another example of the refusal of this Court to separate elements of cost or prices. Thus, it looks to realities and limits the gain or the loss to one thing, the "gain or loss on the sale or exchange."

The problem has also arisen in cases in which assessments are made against other property of taxpayers in condemnation proceedings. The authorities refuse to separate the award into component elements. The net award, *i. e.*, the total judgment less the amount deducted for assessments against uncondemned portions of the property is considered the net selling price, and gain is computed by deducting from that figure the basis of the property to the taxpayer. *Christian Ganahl Co.* v. *Commissioner*, 91 F. (2d) 343 (C. C. A. 9, 1937), certiorari denied, 302 U. S. 748.

After the denial of the petition for certiorari in the *Christian Ganahl* case, the respondent promulgated G. C. M. 20322 (C. B. 1938-2, p. 167) in which he adopted the principle of that case as the correct rule, holding:

> "After careful consideration, this office is of the opinion that the various steps incident to a street opening or similar improvement project, including the condemnation award for property taken, the award for severance damages to and a special benefit assessment levied against the remaining portion of the plot or parcel of real estate constitute a single proceeding the

result of which are to be calculated as an entirety for Federal income tax purposes."

This ruling was applied to the assessment made against the uncondemned portion of the petitioner's property. (Computation R. 22) It is in agreement with the following decisions of the Second and Ninth Circuit.

Christian Ganahl Co. v. *Commissioner, supra.*
Central & Pacific Imp. Corp. v. *Commissioner*, 92 F. (2d) 88 (C. C. A. 9).
Wolf v. *Commissioner*, 77 F. (2d) 455 (C. C. A. 9).
Carrano v. *Commissioner* 70 F. (2d) 319 (C. C. A. 2).

The facts in *Wolf* v. *Commissioner, supra*, illustrate the wisdom of treating a condemnation as a single taxable event. There the assessment against the uncondemned portion of the taxpayer's lot exceeded the amount of the award. The Ninth Circuit refused to separate the transaction into a sale of part of the lot and a benefit assessment against the retained part. It held that:

"* * * it is clear that the entire proceeding for the opening of a street is one proceeding, and the result should be treated as an entirety." (p. 102)

Any attempt to segregate the elements in an award of just compensation and to treat them separately for tax purposes will lead to administrative confusion and uncertainty.

VI.

The Decisions of the Circuit Court of Appeals for the Second Circuit With Which the Decision Below is in Conflict Are in Agreement With Precedent and Sound in Principle.

The Second Circuit had before it the identical issue in *Seaside Improvement Co.* v. *Commissioner, supra.*[6] It held

[6] This decision is reviewed and approved in an excellent article by John L. Rubsam, 39 Michigan Law Review, p. 170.

that the so-called "interest" was part of the capital gain and not a separate taxable item.

The decision of the Second Circuit is based upon sound authority and is correct in principle. The opinion on this point, by Judge Swan, states:

> "Finally, it is contended that the Board erred in holding that such part of the awards as was denominated 'interest' was taxable as ordinary income and not as capital gain. This question only concerns the individual petitioners, John W. Wainwright and Estate of Margaret Wainwright, since the corporate taxpayers are taxable at the same rate however the question be decided. Section 13(a) Revenue Act of 1928, 45 Stat. 797, 26 U. S. C. A. § 13 and note. We believe the petitioners' contention is sound. It is uniformly held that an owner is entitled not only to the value of the land condemned at the time of the taking but also to such additional sums as will indemnify for delay in payment of the award. *Such additional sums are not considered normal interest but part of the compensation awarded for the property taken.* Thus, they may be recovered against the United States as part of 'the just compensation' although by section 177 of the Judicial Code, as amended 28 U. S. C. A. § 284, interest may not be collected from the United States on unpaid accounts or claims. Seaboard Air Line Ry. v. United States, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664; Phelps v. United States, 274 U. S. 341, 47 S. Ct. 611, 71 L. Ed. 1083; Shoshone Tribe v. United States, 299 U. S. 476, 57 S. Ct. 244, 81 L. Ed. 361. Such 'interest' is also considered as part of the condemnation award by the courts of New York. Matter of City of New York, 222 N. Y. 370, 373, 118 N. E. 807; Woodward-Brown Realty Co. v. City of New York, 235 N. Y. 278, 139 N. E. 267. It is accorded similar treatment by section 976 of the Greater New York Charter which provides that 'interest at the legal rate upon the sum or sums to which the owners are justly entitled * * * shall be awarded * * * as part of the compensation to which such owners are entitled.' Cases dealing with payments made to individuals by the Mixed Claims Commission afford a persuasive analogy to the rule that should be applied in the cases at bar. Drier v. Helver-

ing, 63 App. D. C. 283, 72 F. (2d) 76; Commissioner v. Speyer, C. C. A. 2, 77 F. (2d) 824; Helvering v. Drier, C. C. A. 4, 79 F. (2d) 501. In each of these cases a portion of the payments received by the taxpayer had been designated as interest, and the Commissioner contended that such 'interest' was part of the taxpayer's normal income; but this argument was rejected on the ground that no taxable income was received so long as the total of the award did not exceed the value of the property taken. It is obvious that in these cases the interest on the award was treated as part of the capital, for if it had been considered normal interest it would have been taxable as such irrespective of whether the taxpayer had already received a sum equal to the value of the property taken. In United States Trust Co. v. Anderson, C. C. A. 2, 65 F. (2d) 575, this court held that interest on a condemnation award was taxable, but whether it was normal income or capital gain was not discussed. For the reasons above stated we think that the portion of the awards denominated interest should be taxed as capital gain."

The question again came before the Second Circuit in the *Commissioner* v. *Appleby's Estate*, *supra*. The Court followed its previous holding, but stated that "* * * if the matter were *tabula rasa* not all of the Court as now constituted would reach that conclusion." This can mean only that a minority of the Court might not reach the same conclusion. If it meant anything else the Second Circuit would have reversed itself.

The United States Board of Tax Appeals again had the question before it after the decision of the Circuit Court of Appeals for the Third Circuit in this case. It was not impressed by the decision, and it continues to follow the decisions of the Second Circuit.

Brown v. *Commissioner*, 47 B. T. A. 139, decided June 16, 1942.

VII.

The Circuit Court of Appeals for the Third Circuit Failed to Follow the Settled Rule of this Court that the Compensation in Eminent Domain Cases Includes Interest Not as Interest per se, but as a Part of the Damages Awarded for the Property.

This Court in *Seaboard Airline Ry. Co. v. United States*, *supra*, held that although there was no provision in the Lever Act in respect of interest and Sec. 177 of the Judicial Code prohibited the allowance of interest on judgments against the United States, a judgment against the United States allowing interest at 6 per cent from the date of taking was proper in a proceeding to obtain just compensation.

This Court said:

> "It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and § 10 of the Lever Act directs payment. The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. *The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.* Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added."

The rule of the *Seaboard Airline Ry. Co.* case has been applied by this Court in the following cases:

> *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 82 L. Ed. 1219;

Shoshone Tribe v. *United States*, 299 U. S. 476, 496-498, 81 L. Ed. 360, 368-370, 57 S. Ct. 244;
Jacobs v. *United States*, 290 U. S. 13, 78 L. Ed. 142, 54 S. Ct. 26;
Russian Volunteer Fleet v. *United States*, 282 U. S. 481, 75 L. Ed. 473, 51 S. Ct. 229;
Liggett & Myers Tobacco Co. v. *United States*, 274 U. S. 215;
Phelps v. *United States*, 274 U. S. 341, 71 L. Ed. 1083, 47 S. Ct. 611;
Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106.

The rule of these cases is that "interest" paid to property owners as a part of the award is not interest as such, or as is usually understood in the business world, but is a convenient and fair measure of one element of the sum to which the owner of the property is entitled to be paid for his property. It is a part of the price paid to indemnify the owner for his property which must be compared with the basis to ascertain if a gain or loss has been realized on the single transaction.

The circuit court of appeals (R. 45) in referring to these cases said:

> "The Supreme Court has said several times in cases involving appropriation of land by the United States that the item labelled interest in the award is really part of the just compensation to which the property owner is constitutionally entitled. We have no doubt concerning the authority or the correctness of the decisions cited."

However, instead of applying the principle of those authorities to ascertain the nature of "interest" included in an award of just compensation the Circuit Court of Appeals for the Third Circuit resorts for authority, to a text book on Damages (p. 47) the first edition of which was written in 1882, and the 4th edition in 1916, many years before this Court established the applicable doctrine. In so doing it fell into palpable error.

The quotation from Sutherland on Damages that the "interest" is awarded "not strictly as damages", which the circuit court of appeals stated "seems to be correct", is directly contrary to the decisions of this Court cited hereinbefore.

In the present case the so-called "interest" is a part of the award of compensation paid to the owner for the property not as a penalty for the use of borrowed money, but as a substantive right "attaching itself automatically to an award of damages." *Shoshone Tribe* v. *United States, supra.*

In the *Klamath* case the statute conferring jurisdiction on the Court of Claims provided: "That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, *damages* therefore shall be confined to the value of the said land at the time of said appropriation . . ."

The Court of Claims awarded interest against the United States on the value of the land to the date of judgment. The Government contended that the above-quoted jurisdictional act limited the recovery to the value of the land on the date of taking, without interest, irrespective of whether there was a taking within the meaning of the Fifth Amendment. This Court affirmed upon the principle that interest was an integral part of just compensation, stating (p. 123):

> "Nor is it quite accurate to say that interest as such is added to value at the time of the taking in order to arrive at just compensation subsequently ascertained and paid. The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

In *Shoshone Tribe* v. *United States, supra,* this court held under a jurisdictional act silent as to interest or any substitute therefor that:

> "The claimant's *damages* include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances."

In *Phelps* v. *United States, supra,* the plaintiff was owner of a lease on Pier 7 of Bush Terminal in New York Harbor. The pier was requisitioned by the Secretary of War at the direction of the President in 1917. The United States occupied the pier to 1919. Plaintiff paid rent to the lessor and was reimbursed for that amount by the United States. A suit was filed in the Court of Claims to recover just compensation. The Court of Claims in 1926 awarded the value of the use, without an allowance for a sum which would produce the equivalent of the value of the use of the property paid contemporaneously.

This Court, following its prior decisions, reversed, stating:

> "Plaintiff's property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed."

In *Liggett & Myers Tobacco Co.* v. *United States, supra,* the question involved was the claim for an additional sum measured by interest as a part of just compensation. This Court held:

> "The findings show that plaintiff's property was taken by eminent domain; and its just compensation includes the additional amount claimed."

Jacobs v. *United States, supra,* involved a suit against the United States to recover compensation for the occasional flooding of plaintiff's property. The judgment of the District Court found plaintiffs were entitled to the amount of damage "together with interest thereon at 6 per cent from date of taking until now as just compensation under the Fifth Amendment." On appeal the Circuit Court of Appeals for the Fifth Circuit held that interest was not recoverable. This Court reversed in an opinion by Chief Justice Hughes in which it is stated:

> "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking'. Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.'"

It is respectfully submitted that under the foregoing decisions the so-called "interest" included in the damages recoverable by the property owners is not interest as such, but is a part of the award of just compensation for the property. It, therefore, is not ordinary income under the Revenue laws.

VIII.

The Decision of the Circuit Court of Appeals is in Conflict With the Principle that So-Called "Interest" in a Condemnation Award is Not Interest on an Obligation of a State.

The lower courts have had occasion to decide whether the "interest" in a condemnation award is exempt from taxation under what is now Sec. 22(b)(4) of the Internal Revenue Code as "interest on an obligation of a state."

Among the decisions involving that issue are:

Holley v. *United States*, 124 F. (2d) 909 (C. C. A. 6, 1942);
Posselius v. *United States*, 31 F. Supp. 161 (Ct. Cl. 1940);
Williams Land Co. v. U. S., 31 F. Supp. 154 (Ct. Cl. 1940);
Baltimore & Ohio R. Co. v. *Commissioner*, 78 F. (2d) 460 (C. C. A. 4, 1935);
U. S. Trust Co. of New York v. *Anderson*, 65 F. (2d) 575 (C. C. A. 2, 1933).

The court below correctly stated (R. 46) that "those decisions are to the effect that the additional payments are not interest with the purview of the revenue acts." However, it suggests that they are not determinative because the problem involved is one of the scope of the exemption provision. It would seem that if "interest" is not interest for purposes of the exemption sections of the law, it is not interest for the gross income section of the same act. The case deals with the identical word under the same statute. To attribute to Congress an intent to treat part of the "just compensation" as interest under Sec. 22(a) and not as interest under Sec. 22(b) would be to violate the "natural presumption" that "identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 76 L. Ed. 1204. It is submitted that Congress did not intend "interest" included in a con-

demnation award to be treated as interest under either section and that the group of cases above-cited is correctly decided.

IX.

The Principle of the Decision Below Will Result in the Taxation of a Gain as Ordinary Income When in Reality a Loss Was Sustained.

The question involved in this case has been before the courts in cases in which the amount received as just compensation, including so-called "interest", was less than the basis to the taxpayer:

Helvering v. *Drier*, 79 F. (2d) 501 (C. C. A. 4, 1935);
Commissioner v. *Speyer*, 77 F. (2d) 924 (C. C. A. 2, 1935) cert. denied 298 U. S. 631;
Drier v. *Helvering*, 72 F. (2d) 76 (C. C. A. D. C. 1934);
Consorzio Veneziano di Armamento e Navigazione v. *Commissioner*, 21 B. T. A. 984 (1930);
N. V. Koninklijke Hollandische Lloyd (Royal Holland Lloyd) v. *Commissioner*, 34 B. T. A. 830 (1936).

The circuit court of appeals cited the above court decisions in a footnote. (R. 47) It did not state that these cases were incorrectly decided. However, it avoided the weight to which those authorities were entitled by stating that they were cases "where considerations irrelevant here, were prevailing there." It would seem that if it is not proper to segregate the "interest" in a condemnation award in a case in which the net result of the transaction is a loss, it is not proper to do so when there is a gain, for Sec. 22(a) specifically includes as gross income the item of interest, separately and apart from gains on the sale of property, and irrespective of whether the taxpayer had already recovered his basis.

X.

The Principle Applied by the Circuit Court of Appeals for the Third Circuit in Taxing the Part of the Award Designated "Interest" as Ordinary Income and the Balance of the Award as Capital, Will Result in Difficulty of Administration and is Contrary to the Present Administrative Rule.

Under the decision below no part of the expenses of the condemnation proceedings is allowed as a reduction of the part of the award treated as ordinary income.[7]

The decision of the Court below segregated the so-called "interest" of $15,246.57 from the just compensation, and subjected it to tax as ordinary income, without any allowance for the attorney's fees and disbursements petitioners paid to obtain the just compensation, or the assessment paid for street opening. Thus, the so-called "interest" is treated as gain in its full amount, leaving the balance of the award to offset expenses.

We make this point not for the purpose of asking for an apportionment of the expenses between the alleged ordinary income and the capital gain on some arbitrary basis, but as illustration of the administrative difficulties which result from the decision.

There would be no need for allocations or apportionments if the transaction is treated as it really is—one sale—and

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[7] The following computation is a restatement of computation at R. 22:

Total just compensation, (including so-called "interest" $15,246.57) received by petitioners		$73,246.57
Basis to Petitioners		41,866.25
Gross gain on sale		$31,380.32
Less Amounts petitioners were required to pay:		
(1) Attorney's fees and disbursements	$2,479.39	
(2) Assessment for street opening	824.92	
		3,304.31
Petitioners' Net Gain		$28,076.01

the gain in its entirety taxed as gain on the sale of a capital asset as required by the present administrative rule, G.C.M. 20322, *supra*.

CONCLUSION.

It is respectfully submitted that the decision of the Court below is contrary to authority and unsound in principle and should be reversed.

Respectfully submitted,

HARRY FRIEDMAN,
Attorney for Petitioners.

JULIEN W. NEWMAN,
Of Counsel.

APPENDIX.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * * * * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

Greater New York Charter, Chapter XVII, Title 4, Article I:

The city may acquire real property for streets, parks, et cetera.

SEC. 970. The city of New York may acquire title either in fee or to an easement, as may be determined by the board of estimate and apportionment, for the use of the public, to all or any of the real property required for streets and court-yards abutting streets, and for parks, parkways, playgrounds, approaches to bridges and tunnels and sites or lands above the water for bridges and tunnels, and sites or lands above or under water for all improvements of the navigation of waters within or separating portions of the city of New York for the improvement of the waterfronts of the city of New York, or part or parts thereof, heretofore duly laid out upon the map or plan of the city of New York, of the city of Brooklyn, or Long Island City, or of any of the territory consolidated with the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York or hereafter duly laid out upon the map or plan of the city of New York, as herein constituted, and cause the same to be opened, or acquire title as above stated to such interests in real property as will promote public utility, comfort, health, enjoyment, or adornment, the acquisition of which is not elsewhere provided for. The board of estimate and apportionment may specify what use is required of the real property which it may determine shall be acquired for public use, and the extent of such use, and may direct the same to be acquired whenever and as often as it shall deem it for the public interest so to do. * * * In proceedings authorized by the board of estimate and apportionment after the first day of January, nineteen hundred and seventeen, the compensation to which the owners of real property to be acquired for the use of the public for the purposes specified in this section, shall be ascertained and determined by the supreme court without a jury in the manner and according to the procedure prescribed by this title, and on and after said date the city of New York shall make application to the court, or cause application to be made to the supreme court in a county within the city of New York

and within the judicial district in which the real property to be acquired is situated, to have the compensation, which should justly be made to the respective owners of the real property proposed to be acquired, ascertained and determined by the said court, without a jury, and to have the cost of the improvement, or such portion thereof as the board of estimate and apportionment shall direct, assessed by the court upon the real property deemed by the board of estimate and apportionment to be benefited thereby. (*As amended by L. 1922, ch. 563.*)

Vesting of title in the city to real property taken for streets or parks or other purposes.

SEC. 976. The title to the real property lying within the lines of any improvement, authorized herein, shall be vested in the city of New York upon the date of the filing of the damage map in the proceeding, provided, however, that the board of estimate and apportionment may direct, by a resolution adopted by a three-fourths vote, that the title shall be vested in the city of New York upon the date of the entry of the order granting the application to condemn or upon the filing of the final decree, as provided for in this title, or upon such other date as may be specified in said resolution, but not later than the date of the filing of the final decree. Upon the date of the entry of the order granting the application to condemn, or of the filing of the damage map in the proceeding, as the case may be, or upon such subsequent date as may be specified by resolution of said board, the city of New York shall become and be seized in fee of or of the easement, in, over, upon or under, the said real property described in the said order or damage map, as the board of estimate and apportionment may determine, the same to be held appropriated, converted, and used to and for such purpose accordingly. Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to date of the final decree shall be awarded by the court as part of the compensation to which such owners are entitled. The reversal on appeal of the final decree shall not divest the city of title to the real property affected by the

appeal. Upon the vesting of title the city of New York, or any person or persons acting under its authority, may immediately, or any time thereafter, take possession of the real property so vested in the city, or any part or parts thereof, without any suit or proceeding at law for that purpose.

* * * * * * * * *

The title in fee acquired by the city of New York to real property required for all purposes provided for in this title, except street and courtyard purposes, shall be a fee simple absolute. (*As amended by L. 1932, ch. 391.*)

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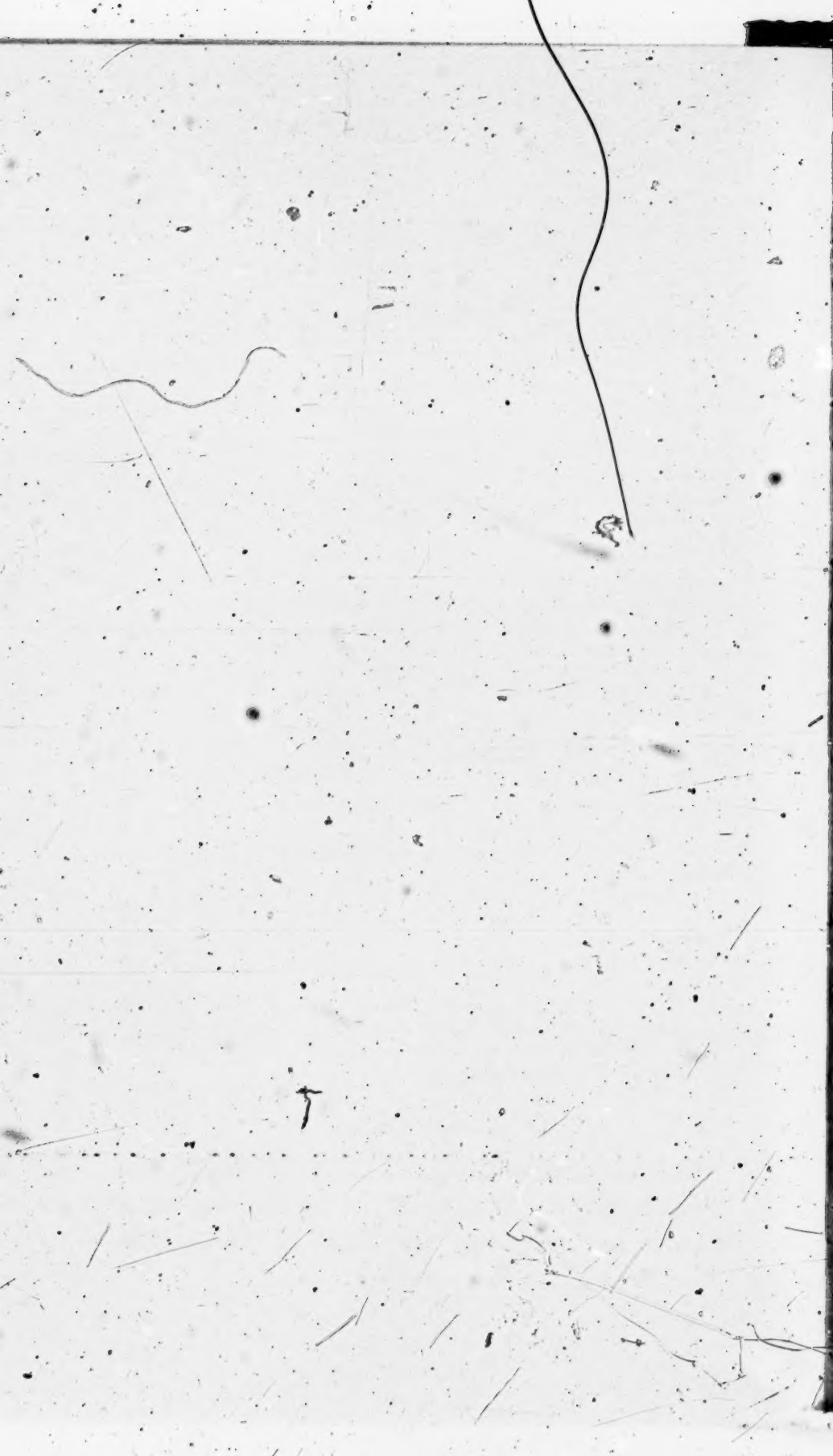

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 184

HENRY A. KIESELBACH AND MRS. OLGA M. KIESELBACH, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 33–37) is reported at 44 B. T. A. 279. The opinion of the circuit court of appeals (R. 42–50) is reported at 127 F. (2d) 359.

JURISDICTION

The judgment of the circuit court of appeals was entered April 7, 1942 (R. 50). The petition for a writ of certiorari was filed June 27, 1942. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the interest awarded in a condemnation proceeding on the value of the land at the date of the taking, running from the date of the taking until entry of the final decree, is taxable as ordinary income.

2. Whether, for the purpose of determining the percentage of gain to be recognized under Section 117 of the Revenue Act of 1936, real estate to which the City of New York purported to take title on January 3, 1933, pursuant to Section 976 of the city charter, should be treated as having ceased to be "held" by the taxpayer upon that date although just compensation was not paid until 1937.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, pp. 8–12, *infra*.

STATEMENT

The facts were stipulated (R. 27–33) and found by the Board as stipulated (R. 34). They may be summarized as follows:

On April 2, 1927, the petitioner Henry A. Kieselbach inherited from his father a parcel of real property in the City of New York. In 1930 the City began condemnation proceedings in the Supreme Court of New York and an order was entered

authorizing the taking of the property and providing that just compensation would be determined by the court. Petitioners filed a formal application for compensation (R. 34).

On December 16, 1932, the Board of Estimates and Apportionment of the City of New York passed a resolution that fee title to the property should pass to the City on January 3, 1933. This was in accordance with Section 976 of the New York City Charter which provided that such a resolution should be effective to vest title in the City (See Appendix, pp. 11–12, *infra*). The City took possession on the latter date, and rents thereafter accruing were collected by or turned over to the City (R. 32, 34–35).

On March 31, 1937, the court entered a final decree in the condemnation proceeding awarding $73,246.57 to the petitioners as "just compensation". The amount was computed by adding interest at 6% per annum from January 3, 1933, to the $58,000 principal amount. The award was paid on May 12, 1937. No deposit or security for the payment of compensation had been given by the City prior to final payment (R. 35).

The Commissioner in his deficiency notice determined (1) that the portion of the award computed as interest was taxable as ordinary income in 1937, and was not part of the price contributing to capital gain (R. 10–11), and (2) that the condemned property had been held by petitioners only until

January 3, 1933, when the City took possession and title under the resolution of the Board of Estimates and Apportionment (R. 12–13). The Board of Tax Appeals set aside the Commissioner's determination on both points (R. 36–37). On appeal the circuit court of appeals reversed the decision of the Board and affirmed the Commissioner's determination (R. 42–50).

ARGUMENT

1. The decision of the court below is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *Seaside Improvement Co.* v. *Commissioner*, 105 F. (2d) 990, and *Commissioner* v. *Appelby's Estate*, 123 F. (2d) 700, upon the question of whether the portion of a condemnation award computed as interest from the date of taking is taxable as ordinary income or as part of the price received upon exchange of a capital asset. The court below recognized the conflict (R. 47). Accordingly, although we believe the decision below to be correct, we do not oppose the granting of certiorari with respect to this issue.

2. The second question presented, however, does not require further review. The court below correctly rejected petitioners' contention that they "held" the property until the award of compensation was paid on May 12, 1937, notwithstanding that the City purported to take title on January 3, 1933, and did in fact hold possession and collect the rents

after that date. At the time of the taking the Greater New York City Charter allowed the City to condemn land and, in Section 976, authorized the Board of Estimates and Apportionment to fix the date on which title should pass. (See Appendix, pp. 11–12, *infra.*) The owner had the right to a judicial determination of what was "just compensation" and to enforce the award against the City by court proceedings. He also was entitled to interest on the principal amount of the award, the interest to run from the date fixed by the Board of Estimates and Apportionment for the transfer of title. Greater New York City Charter, Secs. 970, 976, 981, 995, 996. In the instant case, the resolution fixed January 3, 1933, as the date upon which title should vest in the City and upon that date the City in fact took possession of the property. Consequently, it is plain that unless the statutory provisions were invalid, the petitioners ceased to hold the property on January 3, 1933.

Before the Board of Tax Appeals and in the court below petitioner contended that these provisions of the city charter were unconstitutional on the ground that a taking is invalid unless preceded by the payment of just compensation. But the New York Court of Appeals has held squarely that there is no violation of the state constitution in taking property prior to the payment of compensation provided that adequate provision is made for the prompt determination of just compensation and for payment of the award. *Kahlen* v. *State of New York,* 223 N. Y. 383. In-

deed, in *A. F. & G. Realty Co.* v. *City of New York*, 313 U. S. 540, the very case upon which petitioners rely for a conflict, the state courts declared that title vested in the City on the date fixed by a resolution of the Board of Estimates and Apportionment acting under Section 976. *In re Bronx River Parkway*, 284 N. Y. 48, 52; 259 App. Div 552, 553. Likewise, it is settled that the federal constitution does not forbid a state to authorize a city to take absolute title at the outset provided the state recognizes the absolute right of the owner to recover just compensation in a suit against the city. *Sweet* v. *Rechel*, 159 U. S. 380, 404; *Phillips* v. *Commissioner*, 283 U. S. 589, 597. *Garrison* v. *City of New York*, 21 Wall. 196, is consistent with those decisions; the Court said simply that payment of compensation "or provision for its payment must precede the taking (21 Wall. at 204).

This second question rests upon a tenuous collateral point of constitutional law, which petitioners may well lack standing to raise in this proceeding.[1] It is unrelated to the first question presented. There is no conflict of decisions upon it and it is not important in the administration of the revenue laws.

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[1] It would seem that after participating without objection in a condemnation proceeding conducted on the assumption that title passed on January 3, 1933, and accepting an award made on that basis, petitioners lack standing now to assert that that section is invalid. See *Scholey* v. *Rew*, 90 U. S. 331; *Great Falls Mfg. Co.* v. *The Attorney General*, 124 U. S. 581; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407.

In respect to the second question presented, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY, 1942.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

Greater New York Charter, Chapter XVII, Title 4, Article I:

The city may acquire real property for streets, parks, et cetera.

SEC. 970. The city of New York may acquire title either in fee or to an easement, as may be determined by the board of estimate and apportionment, for the use of the public, to all or any of the real property required for streets and court-yards abutting streets, and for parks, parkways, playgrounds, approaches to bridges and tunnels and sites or lands above the water for bridges and tunnels, and sites or lands above or under water for all improvements of the navigation of waters within or separating portions of the city of New York for the improvement of the waterfronts of the city of New York, or part or parts thereof, heretofore duly laid out upon the map or plan of the city of New York, of the city of Brooklyn, or Long Island City, or of any of the territory consolidated

with the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York or hereafter duly laid out upon the map or plan of the city of New York, as herein constituted, and cause the same to be opened, or acquire title as above stated to such interests in real property as will promote public utility, comfort, health, enjoyment, or adornment, the acquisition of which is not elsewhere provided for. The board of estimate and apportionment may specify what use is required of the real property which it may determine shall be acquired for public use, and the extent of such use, and may direct the same to be acquired whenever and as often as it shall deem it for the public interest so to do. * * * In proceedings authorized by the board of estimate and apportionment after the first day of January, nineteen hundred and seventeen, the compensation to which the owners of real property to be acquired for the use of the public for the purposes specified in this section, shall be ascertained and determined by the supreme court without a jury in the manner and according to the procedure prescribed by this title, and on and after said date the city of New York shall make application to the court, or cause application to be made to the supreme court in a county within the city of New York and within the judicial district in which the real property to be acquired is situated, to have the compensation, which should justly be made to the respective owners of the real property proposed to be acquired, ascertained and determined by the said court, without a jury, and to have the cost of the improvement, or such portion thereof as the board of estimate and apportionment shall direct, assessed by the court

upon the real property deemed by the board of estimate and apportionment to be benefited thereby. (*As amended by L. 1922, ch. 563.*)

Vesting of title in the city to real property taken for streets or parks or other purposes.

SEC. 976. The title to the real property lying within the lines of any improvement, authorized herein, shall be vested in the city of New York upon the date of the filing of the damage map in the proceeding, provided, however, that the board of estimate and apportionment may direct, by a resolution adopted by a three-fourths vote, that the title shall be vested in the city of New York upon the date of the entry of the order granting the application to condemn or upon the filing of the final decree, as provided for in this title, or upon such other date as may be specified in said resolution, but not later than the date of the filing of the final decree. Upon the date of the entry of the order granting the application to condemn, or of the filing of the damage map in the proceeding, as the case may be, or upon such subsequent date as may be specified by resolution of said board, the city of New York shall become and be seized in fee of or of the easement, in, over, upon or under, the said real property described in the said order or damage map, as the board of estimate and apportionment may determine, the same to be held appropriated, converted, and used to and for such purpose accordingly. Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to date of the final decree shall be awarded by

the court as part of the compensation to which such owners are entitled. The reversal on appeal of the final decree shall not divest the city of title to the real property affected by the appeal. Upon the vesting of title the city of New York, or any person or persons acting under its authority, may immediately, or any time thereafter, take possession of the real property so vested in the city, or any part or parts thereof, without any suit or proceeding at law for that purpose.

* * * * *

The title in fee acquired by the city of New York to real property required for all purposes provided for in this title, except street and courtyard purposes, shall be a fee simple absolute. (*As amended by L. 1932, ch. 391.*)

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 184

In the Supreme Court of the United States

OCTOBER TERM, 1942

HENRY A. KIESELBACH AND MRS. OLGA M. KIESELBACH, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 33–37) is reported at 44 B. T. A. 279. The opinion of the Circuit Court of Appeals (R. 42–50) is reported at 127 F. (2d) 359.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 7, 1942. (R. 50.) The petition for a writ of certiorari was filed June 27, 1942, and granted October 12, 1942, but the writ was limited to the first question presented by the

petition. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A condemnation award to taxpayer for land taken by the City of New York included interest calculated at 6% per annum upon the value of the land at the date of the taking, and running from that date until payment of the award. Is that interest taxable as ordinary income or is it part of taxpayer's capital gain taxable to the limited extent provided for in Section 117 (a) of the Revenue Act of 1936?

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648;

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

* * * * *

Pertinent excerpts from the Greater New York Charter will be found in the Appendix, *infra*, pp. 23–26.

STATEMENT

The facts were stipulated (R. 27–33) and found by the Board of Tax Appeals as stipulated (R. 34). They may be summarized as follows:

On April 2, 1927, taxpayer, Henry A. Kieselbach, inherited from his father a parcel of real property in the City of New York. In 1930 the city began condemnation proceedings in the Supreme Court of New York and an order was entered authorizing the taking of most of the property and providing that just compensation

would be determined by the court. Taxpayer[1] filed a formal application for compensation. (R. 34.)

On December 16, 1932, the Board of Estimates and Apportionment of the City of New York passed a resolution that fee title to the property should pass to the city on January 3, 1933. This was in accordance with Section 976 of the New York City Charter, which provided that such a resolution should be effective to vest title in the city (see Appendix, *infra*). The city took possession on the latter date, and rents thereafter accruing were collected by or turned over to the city. (R. 32, 34–35.)

On March 31, 1937, the court entered a final decree in the condemnation proceeding awarding $73,246.57 to the petitioners as "just compensation," and the award was paid on May 12, 1937. It was computed by adding to a $58,000 principal amount interest thereon at 6% per annum from January 3, 1933, when the city first took title and possession, until May 12, 1937, the date of payment. (R. 30–31, 35.)

The Commissioner in his deficiency notice determined that the portion of the award computed as interest was taxable as ordinary income in 1937, and was not part of the price contributing to

[1] "Taxpayer" is used herein to refer to Henry Kieselbach, owner of the condemned property. Olga Kieselbach, his wife, is involved here because a joint return was filed. (R. 28.)

capital gain. (R. 10–11.) The Board of Tax Appeals reversed the Commissioner (R. 36–37), but was in turn reversed by the Circuit Court of Appeals (R. 42–50).

SUMMARY OF ARGUMENT

Interest upon the price paid for property is compensation for the use of capital; it is ordinary income and is not part of the amount realized upon the disposition of the property which determines the capital gain (or loss) resulting from the disposition. The separable character of such interest has been recognized whenever it was separately computed in the agreement of the parties, or under the mandate of the statute authorizing its payment. In the instant case, taxpayer's property was condemned pursuant to the Greater New York Charter, which required just compensation to the owner at the date of the taking of his property, plus interest thereon from that date until the date of payment of the compensation. The amount awarded to taxpayer in the instant case was computed in that way. The portion of the award designated as interest was properly treated as ordinary income (not capital gain) by the Circuit Court of Appeals.

ARGUMENT

THE PORTION OF THE CONDEMNATION AWARD COMPUTED AS INTEREST WAS TAXABLE AS ORDINARY INCOME, AND NOT AS CAPITAL GAIN

1. The issue involved herein is narrow. The City of New York acquired title to the taxpayer's

property on January 3, 1933, but the final decree fixing the amount of the award was not entered until March 31, 1937. The award was paid on May 12, 1937; it consisted of a principal amount of $58,000 together with interest in the amount of $15,246.57, computed at 6% per annum from January 3, 1933 to May 12, 1937. The interest was awarded in accordance with Section 976 of the Greater New York Charter, which provides (see Appendix, *infra*, p. 24):

> * * * Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to the date of the final decree shall be awarded by the court as part of the compensation to which such owners are entitled. * * *

The question is whether the profit represented by the payment of such interest is to be treated as ordinary income taxable in full at the usual surtax rates, or whether it is to be treated merely as capital gain. We submit that the court below correctly classified such interest as ordinary income.

The Board of Tax Appeals originally ruled that such interest constituted ordinary income. *Jamieson Associates, Inc.* v. *Commissioner*, 37 B. T. A. 92. However, the decision was reversed *sub nom Seaside Improvement Co.* v. *Commissioner*, 105 F. (2d) 990 (C. C. A. 2d), and the Board there-

after followed the Second Circuit.[2] But the Second Circuit itself became somewhat uncertain as to the correctness of its decision, for in *Commissioner* v. *Appleby's Estate*, 123 F. (2d) 700, 701 (C. C. A. 2d), it observed that it felt constrained to follow the *Seaside* case "though if the matter were tabula rasa not all of the court as now constituted would reach that conclusion." The court below in the instant case, on the other hand, did not feel itself bound by any prior decision on this issue, and approved the position originally taken by the Board of Tax Appeals.

2. Section 111 (a) of the Revenue Act of 1936 defines gain from the sale or other disposition of property as "the excess of the amount realized therefrom over the adjusted basis." In this case, the amount realized from the condemnation sale of the taxpayer's property was the principal amount of the award, $58,000. To the extent that this amount exceeded the taxpayer's basis, such excess[3] constituted capital gain. But the interest

[2] In addition to the decision in the instant case, the Board followed the *Seaside* case in several unreported decisions as well as in *Appleby* v. *Commissioner*, 41 B. T. A. 18, affirmed by the Second Circuit as noted above; *Barbour* v. *Commissioner*, 44 B. T. A. 1117, pending an appeal to C. C. A. 6th; *Brown* v. *Commissioner*, 47 B. T. A. 139, pending on appeal to C. C. A. 2d; and *Pioneer Real Estate Co.* v. *Commissioner*, decided October 13, 1942, 47 B. T. A. No. 120.

[3] After making certain adjustments and deducting the depreciated basis from the $58,000, there was $11,891.94 of net capital gain reflected in the principal amount of the award. (R. 13.)

on that principal amount, computed, as it was, from the date of taking, was compensation to the taxpayer for the delay in payment; it was ordinary income rather than capital gain for it did not represent payment for the property. Just compensation required not only that the owner be made whole with respect to the full value of the property as of the date of taking, but also that he be given an additional amount to indemnify him for the delay in payment.

That additional amount, as thus computed, is commonly known as interest, and indeed was expressly characterized as "interest" in Section 976 of the New York Charter. It is that common understanding in the business world which was regarded as significant in other circumstances. Cf. *Deputy* v. *duPont*, 308 U. S. 488, 498;[*] *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560–561. The interest herein was paid to the owner, not in exchange for his property, but rather for the failure to compensate him promptly

[*] *Deputy* v. *duPont* involved charges paid with respect to borrowed securities. Unlike the interest in the instant case, those charges were not computed at a fixed percentage on a fixed principal amount. The Court therefore held that they did not constitute interest as that term is commonly understood. In any event, the question here is whether the amount in question constitutes ordinary income rather than capital gain, and even in the situation presented by *Deputy* v. *duPont*, there could be no question that the amounts paid for the use of the stock were ordinary income rather than capital gain to the lender.

for that property. Moreover, it was true interest because it was based upon the amount of money owed by the city; i. e., the value of the property on the date of taking, and was computed at a customary rate "according to lapse of time." *Meilink* v. *Unemployment Comm'n.*, 314 U. S. 564, 569. Cf. *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216; *Wolf* v. *Commissioner*, 84 F. (2d) 390 (C. C. A. 3d); *Scripps* v. *Commissioner*, 96 F. (2d) 492, 495 (C. C. A. 6th), certiorari denied, 305 U. S. 625; *Plunkett* v. *Commissioner*, 118 F. (2d) 644 (C. C. A. 1st); *Arcadia Refining Co.* v. *Commissioner*, 118 F. (2d) 1010 (C. C. A. 5th); *Journal Co.* v. *Commissioner*, 125 F. (2d) 349 (C. C. A. 7th); *Estate Planning Corp.* v. *Commissioner*, 101 F. (2d) 15 (C. C. A. 2d); *Fairmont Creamery Corp.* v. *Helvering*, 89 F. (2d) 810 (App. D. C.).

But regardless of whether the amount in question may strictly be characterized as "interest" for all purposes, it certainly was not paid *in exchange* for the property, and therefore cannot in any event be treated as capital gain. Thus, if a vendor should retain a purchase money mortgage, the interest payable annually by the vendee over a period of years plainly would be ordinary income and not capital gain. The reason is that such interest would not be regarded as the consideration received in exchange for the property; rather, it would represent payment to the vendor

for his forbearance in demanding immediate payment of the principal amount. In the case of the ordinary sale, such interest is determined by the voluntary agreement between the parties. Although the transaction here is involuntary, the legislature nevertheless undertakes to compensate the former owner in precisely the same manner. The additional payment here, as in the case of the voluntary sale, indemnifies the owner for his delay in receiving the price for his property, and is directly proportionate to the lapse of time between passage of title and ultimate payment. That additional compensation does not constitute capital gain; it represents ordinary income taxable in full at the usual surtax rates.[8]

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[8] The mere fact that the sale is involuntary cannot change the operation of the capital gains and losses provisions. Cf. *Helvering* v. *Hammel*, 311 U. S. 504; *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, 312 U. S. 666, reversing *per curiam*, 115 F. (2d) 288 (C. C. A. 8th); *Hawaiian Gas Products* v. *Commissioner*, 126 F. (2d) 4 (C. C. A. 9th), certiorari denied, No. 231, present Term.

[9] Section 976 of the Greater New York Charter provided that interest should accrue only until the date of the final decree awarding compensation. However, the decree awarding compensation like any other money judgment, drew interest from the date of its entry. Greater New York Charter, as amended by Laws of 1932, c. 391, Section 981; *Matter of City of New York (Chrystie St.)*, 264 N. Y. 319; *Matter of Mott Haven Canal Docks*, 196 N. Y. 175; *Woodward-Brown R. Co.* v. *City of New York*, 235 N. Y. 278; *Matter of East River Land Co.*, 206 N. Y. 545. Cf. Gilbert-Bliss Civil Practice Act, Section 481.

The final decree in the instant case was entered on March 31, 1937, about a month and a half before payment of the

3. Petitioner relies upon several lines of cases, none of which is controlling here.

(a) Heavy reliance is placed upon a group of decisions holding that interest in a condemnation award is an essential element of just compensation. *United States* v. *Klamath Indians*, 304 U. S. 119; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *Phelps* v. *United States*, 274 U. S. 341; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106; *Liggett & Myers* v. *United States*, 274 U. S. 215.

These cases were concerned with resolving an apparent conflict between the Constitution, which guarantees just compensation for condemned property, and the well established principle that

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award. Though the stipulation is not clear upon the point, it is a reasonable inference that the computation was made in accordance with the law. If so, the figure $15,246.57 would consist of interest at 6% per annum on $58,000 from January 8, 1933, to March 31, 1937, when the decree was entered, plus interest, on both the principal and interest amounts of the decree from March 31, 1937, until May 12, 1937, the date of payment. The interest figure of $15,246.57 can be approximately arrived at only if the computation is made in this way. Accordingly, even if the Court should agree with the taxpayer as to the interest from the date of taking until March 31, 1937, it is plain that the interest computed upon the total amount of the award from the date of the final decree containing the award to the date of payment was nevertheless interest in the truest sense of the word; and the case in any event should be remanded with directions to treat at least that much of the payment to the taxpayer as ordinary income rather than capital gain.

the United States is not liable for interest upon claims against it in the absence of a specific statute. Despite the absence of such a statute, these cases held that the owner was entitled to the equivalent of interest upon the value of his property from the date of taking until the payment of the award. In *United States* v. *Klamath Indians, supra,* the Court observed (p. 123) that though it was not "quite accurate" to speak of "interest as such" as an element of just compensation, nevertheless the owner was entitled to the—

> value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. * * *

Similarly, in *Seaboard Air Line Ry.* v. *United States, supra,* the Court noted (p. 306) that no statutory command to include interest in a condemnation award is necessary "when interest or its equivalent" is part of the just compensation guaranteed by the Constitution. It further stated that "Interest at a proper rate is a good measure by which to ascertain the amount so to be added" to value at the time of taking in order to arrive at just compensation.

The New York cases are to the same general effect; just compensation includes two elements, namely, the value of the property at the date of taking, and the equivalent of interest thereon to the date of payment. *Matter of the City of New*

York (Bronx River Parkway), 284 N. Y. 48; *Matter of Minzesheimer*, 144 App. Div. (N. Y.) 576, 579, affirmed with approval of opinion below, 204 N. Y. 272; *Matter of Mott Haven Canal Docks*, 196 N. Y. 175; *Matter of Starr*, 198 App. Div. (N. Y.) 859, affirmed, 236 N. Y. 592; *Matter of City of New York* (West 151st St.), 222 N. Y. 370, 372–373.

If the cases just discussed say that interest upon the principal amount of a condemnation award is technically not interest, they also say that it is the same sort of thing, namely, compensation for the use of the owner's capital computed for the period during which he is deprived of its use. Compensation for the use of capital, whether it be "interest" or not, is not compensation for the conversion of the capital itself. Hence, in requiring additional compensation for the delay in payment, the decisions relied upon by the taxpayer (Br. 19–23) in reality support the Commissioner's position and the conclusion of the court below.

(b) Petitioner contends that (Br. 24) the interest payments upon a condemnation award are not ordinary income in the light of *United States Trust Co. of New York* v. *Anderson*, 65 F. (2d) 575 (C. C. A. 2d), certiorari denied, 290 U. S. 683; *Williams Land Co.* v. *United States*, 31 F. Supp. 154 (C. Cls.); *Posselius* v. *United States*, 31 F. Supp. 161 (C. Cls.); *Holley* v. *United States*, 124 F. (2d) 909 (C. C. A. 6th), certiorari

denied, 316 U. S. 685; *Baltimore & O. R. Co.* v. *Commissioner*, 78 F. (2d) 460 (C. C. A. 4th). Those cases deal with Section 22 (b) (4) of the revenue law which exempts from tax "interest upon the obligations of a State," and they hold that interest upon a condemnation award is not exempt under those provisions. The theory of the decisions is that Section 22 (b) (4) was intended to relate only to obligations issued under the borrowing power of the state or municipality. In holding such interest taxable, there is not the remotest suggestion that it constitutes capital gain rather than ordinary income; and indeed an examination of the records in those cases discloses that, wherever anything turned upon the difference between capital gain and ordinary income, the interest was apparently treated as ordinary income.[1]

[1] The records in those cases, except *Baltimore & O. R. Co.* v. *Commissioner*, reveal that the condemnation interest was apparently taxed as ordinary income, and was not treated as part of the price paid for the property. In the *Baltimore & Ohio* case, the Commissioner first computed gain with reference to the principal amount of the award, and added the interest as taxable income (78 F. (2d) at pp. 463–464); the court separately (p. 464) treated the "gain" which was held "clearly taxable", and the "interest" which was said to be "also taxable"; however it was not there material whether the interest was taxed separately or as part of the gain, because the Revenue Act of 1926, there applicable, did not give any capital gain advantage to a corporate taxpayer. See Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 208.

(c) The taxpayer relies (Br. 25) upon three cases involving awards made by the Mixed Claims Commission for property of American citizens seized by Germany during the last war. *Drier* v. *Helvering*, 72 F. (2d) 76 (App. D. C.); *Commissioner* v. *Speijer*, 77 F. (2d) 824 (C. C. A. 2d); certiorari denied, 296 U. S. 631; *Helvering* v. *Drier*, 79 F. (2d) 501 (C. C. A. 4th). The last two cases are wholly inapplicable. In each an award had been made specifying the principal and interest to be paid; payments were thereafter made under the awards in amounts that were insufficient to satisfy the principal of the awards. It was held in both cases that the amounts paid must be allocated to principal, and since they were less than the basis of the property seized, the courts ruled that the taxpayers had not received any income whatever, whether capital gain or ordinary income. Those decisions are therefore sharply distinguishable from the present case where the interest awarded and actually paid represents a profit to the taxpayer.

In the first *Drier* case both the principal and interest under the award were fully paid, but even when taken together they constituted less than the basis of the property seized, with the result that the taxpayer sustained a net loss. That case is thus distinguishable; but even if it were not, the court's refusal to consider the interest separately until the basis had been returned is

probably erroneous under the decisions of this Court. *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216; cf. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *United States* v. *Ludey*, 274 U. S. 295.

(d) The taxpayer relies further (Br. 13–14) upon a group of cases involving installment sales where the vendee undertook to pay for the goods purchased by a series of fixed periodic payments.* *Hundahl* v. *Commissioner*, 118 F. (2d) 349 (C. C. A. 5th); *Daniel Bros. Co.* v. *Commissioner*, 28 F. (2d) 761 (C. C. A. 5th); *Henrietta Mills* v. *Commissioner*, 52 F. (2d) 931 (C. C. A. 4th). See also *MacDonald* v. *Commissioner*, 76 F. (2d) 513 (C. C. A. 2d). In those cases the installments were merely lump sum payments and did not include any interest as such. Although the contracts specified neither a rate of interest nor a principal amount, the vendee nevertheless sought to have the payments artificially broken down into "principal" and "interest", and unsuccessfully

* Taxpayer has also relied (Br. 13–15) upon cases involving payments of charges which had accrued at the date of purchase and which were treated as capital expenditures (*Magruder* v. *Supplee*, 316 U. S. 394; *Helvering* v. *Winmill*, 305 U. S. 79; I. T. 3254, 1939–1 Cum. Bull. 98); and upon a case where the computation of the price as of the date of delivery included an element denominated interest which had accrued prior to delivery (*Pratt-Mallory Co.* v. *United States*, 12 F. Supp. 1020 (C. C[illegible]). None of these cases is like the instant case, which involved interest on the price computed according to lapse of time *following* delivery of title and possession.

claimed a deduction on account of the interest so computed. The rationale of those decisions is that a written agreement may not be varied in a collateral tax proceeding so as to convert part of the stated purchase price into interest. Furthermore, since these decisions relate to deductions, the right to which must be clearly shown,[9] they would not necessarily control the question of the nature of the income received by the seller.

In the instant case, on the other hand, interest was required to be separately computed under Section 976 of the New York charter. It must be assumed that the condemnation decree followed the statutory mandate in this respect (*Matter of Minzesheimer, supra; Matter of Mott Haven Canal Docks, supra; Matter of Starr, supra*), and the stipulation of the parties (R. 30–31) confirms this assumption.[10]

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[9] *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49, and cases there cited. See also *Helvering* v. *Ohio Leather Co.*, Nos. 40–42, present Term, decided November 9, 1942.

[10] Although the condemnation decree is not part of the record herein, taxpayer does not argue that the separate computation of principal and interest was not revealed in the decree or schedules attached to or incorporated in it. Indeed, in view of the stipulation (R. 30–31) that the awarded payment was computed by adding interest to principal, as required by Section 976 of the Greater New York Charter, taxpayer could not make such an argument in absence of more specific proof. Taxpayer bore the burden of showing that the Commissioner's determination (R. 10–12) was erroneous. *Helvering* v. *Taylor*, 293 U. S. 507, 515.

(e) Finally, petitioner seeks (Br. 15–16) to analogize this case to *Carrano* v. *Commissioner*, 70 F. (2d) 319 (C. C. A. 2d); *Wolf* v. *Commissioner*, 77 F. (2d) 455 (C. C. A. 9th); *Christian Ganahl Co.* v. *Commissioner*, 91 F. (2d) 343 (C. C. A. 9th), certiorari denied, 302 U. S. 748; *Central & Pacific Imp. Corp.* v. *Commissioner*, 92 F. (2d) 88 (C. C. A. 9th); and G. C. M. 20322 (1938–2 Cum. Bull. 167), approving *Palladium Amusement Co.* v. *Commissioner*, 37 B. T. A. 149. In each of those cases there had been condemned a *portion* of a parcel of real estate, and the award had been reduced by an assessment for benefits with respect to the other portion retained by the owner. The *Carrano* case held that the owner's profit should be measured by deducting from the face amount of the award, before offset, the owner's cost increased by the assessment; the parties had conceded that the cost of the two portions was recoverable as a unit, and was not allocable between them. In reaching substantially the same result, the other cases held that the owner's gain should be measured by deducting the owner's cost, as it stood prior to the condemnation, from the amount of the award reduced by the assessment. Their theory seems to have been that no income was realized from the portion of the award which was offset by the assessment, for to that extent the owner could show nothing but an enhanced value in the retained property. The correctness of this theory is, we think, open to

serious question. Cf. *Helvering* v. *Bruun*, 309 U. S. 461; *Pioneer Real Estate Co.* v. *Commissioner*, 47 B. T. A. No. 120.

But regardless of the soundness of those cases, they are not in point here. None dealt with an interest problem. In all, the object was to arrive at the correct principal amount of the award and the correct gain resulting therefrom. In each the amount of the award actually involved in the decision, after reduction by the assessment, appears to have been paid simultaneously with the taking of the property.[11]

On the other hand, the instant case involves an award which included interest for the reason that the property had been taken by the city long before payment. The problem here relates to the treatment of this interest, and not to the treatment of an offsetting assessment. Although the deficiency notice and stipulation, when read together, indicate that a portion of taxpayer's

[11] The condemnation statutes involved seem to allow for such a procedure. See California Statutes of 1903, c. 268, pp. 376–386, alluded to in the Ninth Circuit cases; General Statutes of Connecticut, 1918, Sections 5183, 5186, 5194 (and cf. Sections 1433–1440), apparently involved in the *Carrano* case; and the Missouri statutes described in the *Palladium Amusement* case.

In the *Palladium Amusement* case, where the award was offset by certain general and special taxes, as well as benefit assessments, the award was treated for tax purposes as reduced only by the benefit assessments, and the owner was charged with income in the amount withheld for general and special taxes.

land was not condemned but was the subject of a small benefit assessment, nevertheless the wording of the stipulation requires the inference that both principal and interest awarded were paid to the taxpayer without reduction on account of the assessment, and that the payment of the assessment by the taxpayer was an entirely separate transaction. (R. 13, 27–32.) The assessment might have been offset against the amount due under the award, under the applicable New York statutes; but this was not required, and it is apparent that the assessment was in no sense an element of the award under those statutes. Greater New York Charter, as amended, Sections 970–976, 981, 984–988; see in particular Sections 987 and 988. *Matter of Fischer,* 149 App. Div. N. Y.) 618; *Matter of Bankers Investing Co.,* 141 App. Div. (N. Y.) 591. In fact, if there had been an offset it might very well have been effected after the date of the award, in which case it would have reduced not just the award, but the taxpayer's total claim against the city consisting of the amount of the award itself (principal and interest) plus interest on that amount accruing from the date of the award. See Greater New York Charter, Section 988, and fn. 6, *supra.*[12]

[12] In his deficiency notice the Commissioner conceded that the condemnation sale resulted in a capital gain measured by the principal amount of the award, but asserted that the interest was ordinary income. In that computation he offset the assessment, as well as attorney's fees paid in connection with the condemnation, against the principal amount of the

CONCLUSION

The decision of the Circuit Court of Appeals in the instant case was correct, and should be affirmed.

Respectfully submitted,

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DECEMBER 1942.

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award in arriving at taxpayer's gain. (R. 13.) In view of what is said above, the propriety of reducing the gain by the assessment may well be doubted. However, taxpayer's argument to the contrary notwithstanding (Br. 26–27), we think that the attorney's fees were properly deducted in this computation. It would be difficult to show that any part of these fees was allocable to the securing of the interest, which was clearly payable by statute once the principal amount of the award was ascertained.

By his amended answer (R. 16–23) the Commissioner asserted for the first time before the Board of Tax Appeals that the entire gain from the condemnation was ordinary gain, on the theory that there was no "sale" within the meaning of Section 117. In his computation of tax attached to this answer (R. 22) the Commissioner, quite understandably, did not distinguish between the principal and interest portions of the award. This is the computation referred to by the taxpayer in fn. 7 at p. 26 of his brief.

Since the Commissioner has abandoned the contention made in his amended answer, and returned to the position taken in his deficiency notice, the computation in the amended answer has no significance in the present discussion.

APPENDIX

Greater New York Charter, Chapter XVII, Title 4, Article I:

The city may acquire real property for streets, parks, et cetera.

SEC. 970. The city of New York may acquire title either in fee or to an easement, as may be determined by the board of estimate and apportionment, for the use of the public, to all or any of the real property required for streets and court-yards abutting streets, and for parks, parkways, playgrounds, approaches to bridges and tunnels and sites or lands above or under water for bridges and tunnels, and sites or lands above or under water for all improvements of the navigation of waters within or separating portions of the city of New York for the improvement of the waterfronts of the city of New York, or part or parts thereof, heretofore duly laid out upon the map or plan of the city of New York, of the city of Brooklyn, or Long Island City, or of any of the territory consolidated with the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York or hereafter duly laid out upon the map or plan of the city of New York, as herein constituted, and cause the same to be opened, or acquire title as above stated to such interests in real property as will promote public utility, comfort, health, enjoyment, or adornment, the acquisition of which is not elsewhere provided for. The board of estimate and ap-

portionment may specify what use is required of the real property which it may determine shall be acquired for public use, and the extent of such use, and may direct the same to be acquired whenever and as often as it shall deem it for the public interest so to do. * * * In proceedings authorized by the board of estimate and apportionment after the first day of January, nineteen hundred and seventeen, the compensation to which the owners of real property to be acquired for the use of the public for the purposes specified in this section, shall be ascertained and determined by the supreme court without a jury in the manner and according to the procedure prescribed by this title, and on and after said date the city of New York shall make application to the court, or cause application to be made to the supreme court in a county within the city of New York and within the judicial district in which the real property to be acquired is situated, to have the compensation, which should justly be made to the respective owners of the real property proposed to be acquired, ascertained and determined by the said court, without a jury, and to have the cost of the improvement, or such portion thereof as the board of estimate and apportionment shall direct, assessed by the court upon the real property deemed by the board of estimate and apportionment to be benefited thereby. (*As amended by L. 1922, ch. 563.*)

Vesting of title in the city to real property taken for streets or parks or other purposes.

SEC. 976. The title to the real property lying within the lines of any improvement,

authorized herein, shall be vested in the city of New York upon the date of the filing of the damage map in the proceeding, provided, however, that the board of estimate and apportionment may direct, by a resolution adopted by a three-fourths vote, that the title shall be vested in the city of New York upon the date of the entry of the order granting the application to condemn or upon the filing of the final decree, as provided for in this title, or upon such other date as may be specified in said resolution, but not later than the date of the filing of the final decree. Upon the date of the entry of the order granting the application to condemn, or of the filing of the damage map in the proceeding, as the case may be, or upon such subsequent date as may be specified by resolution of said board, the city of New York shall become and be seized in fee of or of the easement, in, over, upon or under, the said real property described in the said order or damage map, as the board of estimate and apportionment may determine, the same to be held, appropriated, converted and used to and for such purpose accordingly. Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to the date of the final decree shall be awarded by the court as part of the compensation to which such owners are entitled. The reversal on appeal of the final decree shall not divest the city of title to the real property affected by the appeal. Upon the vesting of title the city of New York, or any person or persons acting under its authority, may immediately, or

any time thereafter, take possession of the real property so vested in the city, or any part or parts thereof, without any suit or proceeding at law for that purpose. * * *

* * * * * *

The title in fee acquired by the city of New York to real property required for all purposes provided for in this title, except street and courtyard purposes, shall be a fee simple absolute. (*As amended by L. 1932, ch. 391.*)

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 184

IN THE

Supreme Court of the United States

OCTOBER TERM—1942

HENRY A. KIESELBACH and OLGA M. KIESELBACH,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF ON BEHALF OF ISAAC G. JOHNSON AND COMPANY SUBMITTED BY JOHN JAY McKELVEY, *AMICUS CURIAE.*

JOHN JAY McKELVEY,
Amicus Curiae, submitting briefs on behalf of ISAAC G. JOHNSON AND COMPANY.

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ARGUMENT:

I Just compensation, in the case of a forcible taking under power of eminent domain, must, under the provisions of both Federal and State Constitutions, leave the property owner whole insofar as his pecuniary status is concerned.... 6

II Where propery is taken under the right of eminent domain and the owner required to wait until a final court determination of the amount of just compensation to which he is entitled, such compensation to be just must necessarily be sufficient to make him pecuniarily whole at the time of the receipt thereof 7

III The matter is one of substance and not of form. This Court will disregard form and look to the substance in determining the rights and obligations of the parties 9

IV For the purpose of fixing just compensation for property taken by right of eminent domain, the taking cannot be regarded as complete until the amount is determined and final order or judgment entered therefor 10

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V. This Court has definitely determined in analogous cases that interest on an award is to be treated, not as ordinary interest, but as part of just compensation 11

VI. The distinction between capital gain and ordinary income was created for a purpose by Congress. That purpose can only be served by the treatment of an award in condemnation as a single consideration for the property taken..... 13

VII. From the standpoint of tax liability no gain can be predicated upon a forced sale under eminent domain until the base value agreed upon or otherwise fixed for tax purposes is fully covered and the amount received however named must be first applied against such value..... 15

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IN THE

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HENRY A. KIESELBACH and OLGA M. KIESELBACH,
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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF ON BEHALF OF ISAAC G. JOHNSON AND COMPANY SUBMITTED BY JOHN JAY McKELVEY, *AMICUS CURIAE*.

Opinions Below

The opinion of the United States Board of Tax Appeals (R. 33-37) is reported at 44 B.T.A. 279. The opinion of the Circuit Court of Appeals for Third Circuit (R. 42-50) is reported at 127 F. (2d) 359.

Jurisdiction

The judgment of the circuit court of appeals was entered April 7, 1942 (R. 42). Petition for a writ of certiorari was filed June 27, 1942, and was granted October 12, 1942, limited to the first question presented by the petition for certiorari (R. 52). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925.

Question Presented

Whether the part of the award of just compensation computed by the use of an interest factor is a part of the selling price of the property and taxable as capital gain or is a separate and distinct item of income, taxable as ordinary income.

Statutes Involved

Revenue Act of 1939, Section 119.

The Constitution of the United States, Fifth Amendment.

The Constitution of the State of New York, Article 1, Section 6.

Chapter 624, Laws of 1933, New York State.

Administrative Code, City of New York, Chapter 929, Laws of 1937, New York State, Paragraphs B15-19
B15-23.0
B15-23.0-e.
B15-28.0

Request to File Brief

Request is made for permission to file this brief under Rule 27, paragraph 9, and consent of all the parties to the case accompanies the brief.

Statement

Isaac G. Johnson and Company, a domestic corporation, organized and existing under the Laws of the State of New York, filed, on the 18th day of March, 1942, an application for refund of Federal income taxes paid for its fiscal

year ending June 30, 1939. The amount in dispute is $6,522.65. This amount consisted of $5,721.62 deficiency assessed, which was paid on January 14, 1942, and $801.03 interest, which was paid on February 24, 1942. Both said payments were made under protest.

The deficiency so assessed against the corporation was based upon the fact that the Commissioner differed with the corporation as to the status of a part of an award in condemnation, which had been made by the Court of Claims of the State of New York to the corporation for the acquisition by the State of New York of certain lands and lands under water required for the public improvement known as the straightening of the Harlem Ship Canal. The part of the award which was the subject of the difference was the amount arrived at by the Court of Claims by computing interest upon the amount found by it to be the value of the property as of the date of the taking of possession by the State. Such possession was taken and title vested under an Act of Legislature of the State of New York, to wit: Chapter 624 of the Laws of 1933. Under the terms of this act, title and the right of possession was vested in the State on September 27th, 1933.

By the terms of the act, the owner was permitted to apply to the Court of Claims to have determined the just compensation which should be paid for the property so taken. The Court of Claims, after a lengthy trial, rendered judgment in favor of the corporation for the sum of $143,183.83, which was made up of $110,755.25, the value at the time possession was taken by the State, as found by the Court, plus the amount of $32,428.58, arrived at by computing interest to the date of the entry of the judgment.

The corporation claimed the entire amount of the judgment which was paid to it as the just compensation for the forced sale of the property to the State.

Disregarding certain minor questions which have no bearing upon the question presented in the present case, the Commissioner of Internal Revenue, upon the auditing

of the return, segregated the part of the judgment which was measured by the computing of interest from the date of vesting of title to the date of the judgment, as ordinary interest income and the balance of the judgment as the compensation which the corporation had received for the property.

In computing the amount of capital gain or loss involved in the transaction for the purposes of the assessing of the income tax, it was agreed that the 1913 value should be taken as $125,000.00 (an amount much less than claimed in its original return by the corporation). Additions to this 1913 value were allowed by the commissioner of $19,950.17, making a total value at the time the State took possession of $144,950.17.

It will thus be seen, from a comparison of the conceded value of the property at the time of the taking, with the amount which has been treated by the Commissioner as the compensation paid by the State, that the corporation suffers a heavy loss on the property thus forcibly taken from it and that; in addition to such capital loss, it suffers a further loss to the extent of the tax assessed as a deficiency on the balance of the judgment which the commissioners treated as ordinary interest income, the amount of this deficiency paid under protest by the corporation being $6,522.65.

The same question is, therefore, presented upon the above state of facts as that presented in the case before the Court, to wit,—Is that part of a judgment or award in condemnation which is arrived at by computing interest upon the valuation given to the property at the time of the vesting of title to be treated as a part of just compensation to the owner for the taking or as ordinary interest income?

Summary of the Argument

The facts as above recited in respect to the position of the corporation mentioned present a very common situation upon which the decision of the single question raised in the case before this court will have an important bearing.

The Johnson case indicates an extreme to which a decision, holding that interest which enters into an award of just compensation is to be treated as ordinary income, may lead. This extreme result, while not in prospect upon the particular facts of the Kieselbach case, is one which has been and is likely to be of such frequent occurrence as to entitle it to the consideration of the Court in a final authoritative decision of the question.

The inevitable result of the Commissioner's contention if upheld will be to leave many owners whose property is forcibly taken from them in the unfortunate position of suffering a heavy capital loss while at the same time paying taxes upon an illusory gain which is characterized as interest income, unless there be some difference in principle between such a case and a case where the base amount of the compensation exclusive of the added increment is in excess of the value given to the property for the purposes of the tax. Under such circumstances, the tax paid upon the basis of "ordinary interest income" might be little more than if paid on the basis of the whole award being treated as capital gain; though in the case of an individual owner the length of time for which the property was held would, of course, enter into the result.

Substance and not form is under the decisions of this court recognized as controlling in fixing the status of the parties concerned under statutory provisions, contracts or other governing documents.

The principle here involved is one of broad application and should be defined in a manner which will be recognized as controlling by the taxing authorities wherever involved in the facts brought before them.

ARGUMENT

I

Just compensation, in the case of a forcible taking under power of eminent domain, must, under the provisions of both Federal and State Constitutions, leave the property owner whole insofar as his pecuniary status is concerned.

The power of eminent domain is one which is exercised in the public interest and it is one of the foundation principles in our law that the rights of the individual shall not be invaded and his property taken away for public use without justly compensating him therefor.

United States Constitution—Fifth Amendment
New York State Constitution—Article I, Sec. 6.

The term "just compensation" has been sufficiently studied and defined, both in the statutes and in the case decisions, to give it a meaning which should no longer involve uncertainties.

This Court has stated very simply and plainly what just compensation means. It means that "the Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken."

In determining whether or not this obligation has been fulfilled, the Courts and other tribunals empowered to deal with the question, have too frequently differed in their conclusions and thus we have, in the cases, differences upon which arguments may be based for reaching, on some particular state of facts, wholly opposite conclusions.

These diversions from the straight and narrow path to the objective as above defined have usually found correction in some outstanding decision, broad and comprehensive in its import and effect, re-asserting and bringing to the front the underlying basis upon which the right of

eminent domain rests, namely: THE OBLIGATION "TO PUT THE OWNERS IN AS GOOD POSITION PECUNIARILY AS IF THE USE OF THEIR PROPERTY HAD NOT BEEN TAKEN".

II

Where property is taken under the right of eminent domain and the owner required to wait until a final court determination of the amount of just compensation to which he is entitled, such compensation to be just must necessarily be sufficient to make him pecuniarily whole at the time of the receipt thereof.

It is quite obvious that, in many cases, an owner, whose property is taken, loses the income therefrom or the use thereof pending lengthy litigation as to the amount which should be paid to him. This loss is a real pecuniary loss, resulting from the exercise of the right by the taking authority. Compensation cannot be just which does not include a sum which will be the equivalent of this loss. Therefore, the statutes provide, in some States (New York among them), that an award must include such sum and declare it to be a component part of just compensation.

Chapter 929 of the Laws of 1937, Administrative Code. This law provides (Section B15-23.0-a.):

> "The final decree shall also contain a statement that the amounts set opposite the respective damage parcel numbers in the column head 'final awards' in the tabular abstract of awards for damage constitute and are the just compensation which the respective owners are entitled to receive from the city."

And a final award must include interest on the damages (B15-28.0-a):

> "from the date of the filing of the final decree, or if title to the real property acquired shall have vested

in the city prior thereto, from the date of such vesting,"

The fact that the measure adopted to determine the amount of such increment is a prevailing interest percentage does not change its character.

It lacks the essential feature, which money received must have, to be interest. To use the language of this Court:

> "We are dealing with the context of a revenue act and words which have today a well-known meaning. In the business world 'interest on indebtedness' means compensation for the use or forebearance of money. In absence of clear evidence to the contrary, we assume that Congress has used these words in that sense."

Deputy v. *Dupont*, 308 U. S. 488 (1939).

A statutory recognition of the real character of the so-called "interest" which must be included in a final award is found in the language of B15-23.0-e of the New York Statute above referred to, which provides:

> "e. In the case of an assessable improvement proceeding, interest at the legal rate, upon the sum or sums to which owners are justly entitled upon the date of the vesting of title in the city, from such date to the date of the final decree, shall be awarded by the court *as part of the compensation to which such owners are entitled.*" (Italics ours)

The above statutory provisions in New York relate to condemnation proceedings by the City of New York but are expressive of the principle applicable in all cases of forcible taking under power of eminent domain.

III

The matter is one of substance and not of form. This Court will disregard form and look to the substance in determining the rights and obligations of the parties.

The use of the word "interest" in the statutes, awards or judgments, cannot change the essential character of the thing for it is not in fact interest in the sense that term is understood in the business world. It is not payment for the use of borrowed money but a sum, fixed by adopting a percentage measurement, necessary to bring the compensation awarded up to the standard of the just compensation to which the owner is entitled under Federal and State Constitutions.

Deputy v. *Dupont—supra;*
Old Colony R. R. v. *Commissioner*, 284 U. S. 552 (1937);
Seaboard Air Line R. R. Co. v. *U. S.*, 261 U. S. 299.

In the case last cited, the Court says:

> "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of the value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added."

Again this Court has stated:

> "Section 177 (prohibiting *interest* on claims against the U. S.) does not prohibit the inclusion of the additional amount for which petitioner contends. *It is not a claim for interest within the purpose or intention of that section.* Acts of Congress

> are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken." (Italics ours)
>
> *Phelps* v. *U. S.*, 274 U. S. 341.

The above interpretation of the word "interest" on the principle that substance and not form is controlling is wholly in line with the position consistently taken by this Court, a very striking instance of which, though in the field of contracts, is found in the recent case of *Helvering* v. *Le Gierse*, 312 U. S. 531.

IV

For the purpose of fixing just compensation for property taken by right of eminent domain, the taking cannot be regarded as complete until the amount is determined and final order or judgment entered therefor.

Confusion of thought results from losing sight of the above principle. Such confusion is one of the causes of the failure, at times, by the Courts and Taxing Authorities to grasp the true relation of *just compensation* to the taking.

By assuming that the taking is a completed transaction between buyer and forced seller on the date title is vested or possession taken, the mistake is made of regarding the whole question as then one of value at that date; ergo, anything added to such amount must be interest on capital. Thus a false conclusion from a false premise is born.

On the other hand, if the true nature of the transaction be understood, the transaction is not complete, the sale is not consummated, until the price is fixed. Taking title and possession are acts which are only part of the transaction. They may even be illegal acts, as in the case of the Shoshone Tribe lands (299 U. S. 476). They only ripen

into a legally completed sale when there comes into being an obligation to pay a definite sum, which can be only upon the entry of final judgment. It is the inability of the machinery for arriving at such definite price, concidently with the entry of such final judgment, which obliges the Court to take a prior date, as of which value of the property and other elements of damage are fixed, and then to adopt a rule for adjusting that value to the later date when the obligation becomes definite and certain, by the entry of final judgment.

V

This Court has definitely determined in analogous cases that interest on an award is to be treated, not as ordinary interest, but as part of just compensation.

The identical question as to the status of interest on an award has been before the Supreme Court in connection with a number of situations where the determination was essential to the meting out of what this Court deemed to be justice to the parties. In a comparatively recent case, the late Mr. Justice Cardozo rendered an opinion which must be regarded as a determination by this Court of the question. There the Government had taken, without authority of law, land from the Shoshone Indian Tribe. Many years afterwards, the taking was confirmed by Congress. The question of the compensation to be paid was before this Court for determination. Under the provision that interest may not be allowed on claims against the United States, it was urged that no interest could be allowed on the value fixed as of the date of the taking. Justice Cardozo states:

> "The claimant's damage includes such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such

other standard as may be suitable in the light of all of the circumstances."

Shoshone Tribe v. *U. S.*, (1936) 299 U. S. 476, p. 496.

In a prior decision of this Court, involving the same point, where the United States in the World War took possession of property at the Bush Terminal, which was under lease to the plaintiff, the plaintiff claimed, in addition to the amount fixed as reasonable compensation for his lease, an additional amount equivalent to interest. Section 177 of the Judicial Code, provides:

"No interest should be paid on any claim up to the time of rendition of judgment unless upon a contract expressly stipulating for its payment".

Justice Butler says:

"Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim of interest within the purpose or intention of the section. * * * The government obligation is to put the owners in as good a position pecuniarily as if the use of the property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the added amount claimed."

Phelps v. *U. S.* (1927), 274 U. S. 341.

That the lower Courts and the tax tribunals have in general followed the principle thus recognized by the Supreme Court seems clear—*Barbour* v. *Commissioner*, (July, 1941) 44 B. T. A. 1117.

Seaside Improvement Co. v. *Commissioner*, 105 Fed. (2nd) 990;

Appleby's Estate v. *Commissioner*, 78 Fed. (2nd) 700;

Matter of City of New York, 222 N. Y. 370;

Matter of Starr, 198 A. D. 859.

VI

The distinction between capital gain and ordinary income was created for a purpose by Congress. That purpose can only be served by the treatment of an award in condemnation as a single consideration for the property taken.

Where the treatment of the so called interest which is required to be included in the amount of an award in order to provide just compensation to the owner will affect the position of the owner with respect to capital loss or gain, the purpose of the law creating a distinction between capital gain and ordinary income cannot be carried out if the award be divided into two parts and the interest part be taxed as ordinary income.

The Chief Justice of this Court has stated that the provisions of the Act of 1921, reenacted in 1924, which created such distinction—

> "were adopted to relieve the taxpayer from the excessive tax burden on gains resulting from conversion of capital investment and remove the deterrent effects of the burden on said conversions".
>
> *Burnett v. Harmel*, 287 U. S. 103, p. 106.

Where the facts are as in the *Johnson* case and a capital loss faces the owner by reason of the taking, to add to his burdens by treating a part of his award as ordinary income and taxing it as such nullifies the relief intended to be given by the change in the law. It strengthens the "deterrent effects of the burden on the conversion".

Where the question of exemption of certain kinds of ordinary income has come up and the claim for exemption as related to interest on an award treated separately from the amount of the value as fixed, the Courts have declined to treat the interest separately and have denied the claim that it should be so treated as interest on an obligation of the state and, therefore, exempt. Even where the land taken

under condemnation proceedings was subject to agreement as to deferring the payment therefor, the Court says:

> "While the contract to defer payment was voluntary, the taking was not, all the proceedings being under the power of eminent domain and necessarily compulsory upon the appellant. The compensation, therefore, had to be that required in condemnation proceedings, namely, the full equivalent of the value of the land at the time of the taking. Under such circumstances, the interest is conceded to be a part of the award tax, and essential to just compensation for the land where it is taken before full payment is made."
>
> *Holley* v. *U. S.* (U. S. Circuit Court of Appeals, 6th Circuit, January, 1942.) C. C. H. vme. 4, section 9205.

Chief Justice Hiscock of the New York Court of Appeals says, with reference to a claim for interest upon an amount fixed as the value of easements destroyed:

> "Damages in a street closing proceeding should include not only the value of the easements taken or destroyed, but also interest thereon from the date when taken to the date of the report; that such interest is allowable as part of the damages which the property owner has sustained not under any explicit provision of the statute but under the right to due compensation for taking his property, and that such interest need not be separately stated in the report. We thus see that interest on the value of the easements is included in the award under the constitutional requirements for due compensation for property which has been taken. If the property owner received simply the value of his easements without any interest to the time of the award so made, he would not receive such compensation."
>
> *Matter of City of New York*, 222 New York 370.

And in another case, the Court of Appeals holds that a clause in the City Charter which provides that the owner

to whom an award was made in condemnation proceedings "shall not have an action at law against the City of New York for such awards, costs or expenses", takes away the right of an action at law for the interest on the award, since it is a part of the award.

Woodward Brown Co. v. *City of New York*, 235 N. Y. 278.

VII

From the standpoint of tax liability no gain can be predicated upon a forced sale under eminent domain until the base value agreed upon or otherwise fixed for tax purposes is fully covered and the amount received however named must be first applied against such value.

Regardless of the status given to the interest element in an award, it cannot be segregated and taxed separately as ordinary income if the base value for tax purposes exceeds the amount of the award or requires, to be fully covered, some part of the interest element.

The above situation has arisen in connection with the claims made for property destroyed or taken by the German Government in the course of the World War and, where the Mixed Claims Commission held funds consisting of principal deposited to cover the claims and accumulated interest thereon, the question came up as to the taxable status of the interest.

The Court says:

> "In order to arrive at gain or loss, there must be withdrawn from the *gross proceeds* an amount sufficient to restore capital that existed at the commencement of the period under consideration." Doyle v. Mitchell, 247 U. S. 179.

Followed in *Commissioner* v. *Speyer*, 77 Fed. (2nd) 824.

In another case, an award of $48,000.00 principal and $21,138.34 interest was paid. The Board of Tax Appeals for income tax purposes held the property had a base value for tax purposes of not less than the total amount paid, but nevertheless held that the interest was taxable as ordinary income. On appeal, the Appellate Court held:

> "The aggregate of the two sums just equals the value of petitioner's property at the date of acquisition. She got only her original cost for value; and, since that is the test by which to determine either gain or loss, it was obvious that there was no profit and so no income."

Drier v. *Helvering*, 72 Fed. (2nd) 76.

Conclusion

It seems clear that there is a well defined meaning to "just compensation" in the case of awards in condemnation or other payments analogous thereto and that such meaning excludes the idea that a portion of such compensation may be segregated from the whole amount and treated differently for tax purposes.

In the instant case, the interest element in the award should not be treated as ordinary income by the taxing authorities but is a part of the just compensation to which owner was entitled for a forced taking and is subject only to such tax as may accrue thereon by reason of capital gain.

Respectfully submitted,

JOHN JAY McKELVEY,
Amicus Curiae, submitting briefs on behalf of ISAAC G. JOHNSON AND COMPANY.

SUPREME COURT OF THE UNITED STATES.

No. 184.—October Term, 1942.

Henry A. Kieselbach and Olga M. Kieselbach, Petitioners, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 4, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This writ of certiorari was granted limited to a single narrow point in the law of income taxes. The sum in question was received as part of the compensation in a condemnation proceeding instituted by the City of New York. Payment was made several years after the actual taking. The issue concerns the nature of that portion of the payment which is called "interest" by the Greater New York Charter and which the owner must receive, in addition to the value of the property fixed as of the time of the taking, to produce, when actually paid the full equivalent of that value. Was this portion a capital gain or ordinary income?

The writ was granted because of conflict upon the point between this case below, *Commissioner* v. *Kieselbach et al.*, 127 F. 2d 359 (C. C. A. 3), and *Seaside Improvement Co. v. Commissioner*, 105 F. 2d 990 (C. C. A. 2).

The taxpayers owned a piece of realty in the City of New York. In December, 1932, that city's Board of Estimate passed a resolution which directed that upon January 3, 1933, the title in fee to a large part of the parcel would vest in the city. The condemnation proceeding, of which the resolution was a part, was pursuant to Sec. 976 of the Greater New York Charter, which provides in part as follows:

"Upon the date of the entry of the order granting the application to condemn, or of the filing of the damage map in the proceeding, as the case may be, or upon such subsequent date as may be specified by resolution of said board, the city of New York shall become and be seized in fee of or of the easement, in, over, upon or under, the said real property described in the said order or damage map, as the board of estimate and apportionment may determine, the

same to be held, appropriated, converted and used to and for such purpose accordingly. Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to the date of the final decree shall be awarded by the court as part of the compensation to which such owners are entitled."

The city took possession on the date named in the resolution and received all rents thereafter accruing. The Supreme Court of New York entered its final decree in the proceedings on March 31, 1937. It was for $73,246.57 and was stated to be the just compensation which the owners were entitled to receive. Payment was made on May 12, 1937. It has been stipulated that:

"The amount of said payment was computed by adding to the principal amount of $58,000.00, interest thereon as provided by Section 976 of the Greater New York Charter, in the sum of $15,246.57, computed at the rate of 6% per annum from January 3, 1933, to May 12, 1937, or a total of $73,246.57."[1]

We accept as a fact that the $58,000, principal amount just referred to, was, as petitioners allege, an award to them. We assume it was the value on January 3, 1933, of this property then taken by the city.

Section 22 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, 1657, contains the general definition of gross income. It reads as follows:

"(a) *General Definition.*—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ."

The taxpayers' basis on the condemned property was around $42,000. In their original return the difference between the basis and the total sum received was treated as capital gain and only a percentage was returned as income pursuant to Sec. 117.[2] The

[1] No question is raised involving the accuracy of this computation. While Sec. 976 requires interest only to the date of the decree, Sec. 981, Greater New York Charter, as amended by Laws of 1932, c. 391, requires interest on the decree. Matter of City of New York (Chrystie St.) 264 N. Y. 319.

[2] Section 117 reads as follows:

"(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale

Commissioner assessed a deficiency on the portion of the award computed as interest on the ground that such portion was ordinary income. The Board of Tax Appeals reversed the Commissioner and the Circuit Court of Appeals, in turn, held with the Commissioner.

We agree with the Court of Appeals. The sum paid these taxpayers above the award of $58,000 was paid because of the failure to put the award in the taxpayers' hands on the day, January 3, 1933, when the property was taken. This additional payment was necessary to give the owner the full equivalent of the value of the property at the time it was taken. Whether one calls it interest on the value or payments to meet the constitutional requirement of just compensation is immaterial. It is income under Sec. 22, paid to the taxpayers in lieu of what they might have earned on the sum found to be the value of the property on the day the property was taken. It is not a capital gain upon an asset sold under Sec. 117. The sale price was the $58,000.[3]

The property was turned over in January, 1933, by the resolution. This was the sale. Title then passed. The subsequent earnings of the property went to the city. The transaction was as though a purchase money lien at legal interest was retained upon the property. Such interest when paid would, of course, be ordinary income.

From the premises that the value at time of the taking plus compensation for delay in payment equals just compensation, *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 123;[4] and that a good measure of the necessary additional amount is

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or exchange of a capital asset shall be taken into account in computing net income:

"40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

"30 per centum if the capital asset has been held for more than 10 years.

"(b) *Definition of Capital Assets.*—For the purposes of this title, 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), . . ." 49 Stat. 1691.

[3] The involuntary character of the transaction is not significant. Helvering v. Hammel, 311 U. S. 504, 510.

No review is sought of the holding that transfer of property through condemnation proceedings is a sale within the meaning of Sec. 117 of the Revenue Act of 1936. Commissioner v. Kieselbach, 127 F. 2d 359, 360.

[4] See also Shoshone Tribe v. United States, 299 U. S. 476, 496; Phelps v. United States, 274 U. S. 341; Brooks-Scanlon Corp. v. United States, 265 U. S. 106; Liggett & Myers v. United States, 274 U. S. 215.

interest "at a proper rate," *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306, petitioner contends that as just compensation requires the payment of these sums for delay in settlement, they are a part of the damages awarded for the property. But these payments are indemnification for delay, not a part of the sale price. While without their payment just compensation would not be received by the vendor, it does not follow that the additional payments are a part of the sale price under Sec. 117(a). The just compensation constitutionally required is not the same thing as the sale price of a capital asset.[5]

In *Seaside Improvement Co.* v. *Commissioner*, 105 F. 2d 990, 994, an opposite conclusion apparently was reached by treating the additional payments as part of the purchase price as well as part of "just compensation."[6]

Petitioners urge that the additional sum paid should be construed as a part of the sale price in analogy to decisions that such sums, when paid in condemnation proceedings by a state, are not interest entitled to exemption under Sec. 22(b)(4), Internal Revenue Code, as "interest upon the obligations of a state."[7] The cases cited construe the quoted phrase as designed to protect the states' borrowing power. In any event the question here is not whether these sums are interest. They may not be interest and yet be other than part of the sale price.[8] If not interest they may be compensation for the delay in payment.

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[5] The same principle is applicable to the New York decisions, holding that interest is a part of the condemnation award. Just compensation requires satisfaction for the delay by payment of the additional sums. Matter of City of New York (West 151st St.), 222 N. Y. 370, 372; In the matter of Minzesheimer, 144 App. Div. 576, 579, affirmed 204 N. Y. 272; Matter of City of N. Y. (Bronx River Parkway), 284 N. Y. 48, 54. The obligation to pay its value arises when the property is taken. Title then passes. Kahlen v. State of New York, 223 N. Y. 383, 389. Woodward Brown Realty Co. v. City of New York, 235 N. Y. 278, is not to the contrary. It deals with the unity of a right of action on an award with interest, holding only one proceeding is authorized against the condemnor.

[6] "Such additional sums are not considered normal interest but part of the compensation awarded for the property taken." 105 F. 2d at 994.

[7] Holley v. United States, 124 F. 2d 909 (C. C. A. 6, 1942); Pocahontas v. United States, 31 F. Supp. 161 (Ct. Cl. 1940); Williams Land Co. v. United States, 31 F. Supp. 154 (Ct. Cl. 1940); Baltimore & Ohio R. Co. v. Commissioner, 78 F. 2d 460 (C. C. A. 4, 1935); U. S. Trust Co. of New York v. Anderson, 65 F. 2d 575 (C. C. A. 2, 1933).

[8] "Nor is it quite accurate to say that interest as such is added to value at the time of taking in order to arrive at just compensation subsequently ascertained and paid." United States v. Klamath and Modoc Tribes, 304 U. S. 119, 123.

Other contentions are made by the petitioners. It is said that in other situations interest on delayed payments has been treated as part of the principal received and not as normal income.[9] By analogy it is urged that the same principle be applied here. The first three cases in the preceding note involved payments of awards in liquidation of claims against Germany allowed by the Mixed Claims Commission. See Settlement of War Claims Act of 1928, 45 Stat. 254. As the aggregate payments did not equal the taxpayers' basis, the decisions refused to consider as income the portions designated as interest on the ground that in liquidation the investment first must be restored before income is realized. *Koninklijke Hollandische Lloyd* v. *Commissioner* and *Consorzio Veneziano etc.* v. *Commissioner* applied the rule that payment for deferred compensation was not interest under Sec. 119(a)[10] of the Revenue Act of 1932 or 1928. These decisions obviously are not in point on the question whether the additional payments in the present case are part of the sale price or other income under Sec. 22. Nor do we find persuasive the cases refusing to allow an installment purchaser an interest deduction because of his deferred payments where the purpose was an arrangement for the payment of the purchase price.[11] In the present case, the purchase price was settled as of January 3, 1933, when the property was taken over.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[9] Helvering v. Drier, 79 F. 2d 501 ((C. C. A. 4, 1935); Commissioner v. Speyer, 77 F. 2d 824 (C. C. A. 2, 1935); Drier v. Helvering, 72 F. 2d 76 (App. D. C. 1934); Consorzio Veneziano di Armamento e Navigazione v. Commissioner, 21 B. T. A. 984 (1930); N. V. Koninklijke Hollandische Lloyd (Royal Holland Lloyd) v. Commissioner, 34 B. T. A. 830 (1936).

[10] This section specifies interest on interest bearing obligations of residents as one of the items of income from sources within the United States.

[11] Hundahl v. Commissioner, 118 F. 2d 349 (C. C. A. 5th, 1941); Henrietta Mills v. Commissioner, 52 F. 2d 931 (C. C. A. 4th, 1931); Pratt Mallory Co. v. United States, 12 F. Supp. 1020 (Ct. Cl. 1936); Daniel Brothers Co. v. Commissioner, 28 F. 2d 761 (C. C. A. 5th, 1928).